

# EXHIBIT L

ORIGINAL

**In the Matter Of:**  
**MATTHEW BISSONNETTE V. KEVIN PODLASKI**

1:15-CV-00334

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**ROBERT D. LUSKIN**

*January 18, 2017*

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MATTHEW BISSONNETTE V. KEVIN PODLASKI

January 18, 2017  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA

-----X  
MATTHEW BISSONNETTE, )  
Plaintiff ) Case No.:  
V. ) 1:15-CV-00334  
KEVIN PODLASKI and CARSON )  
BOXBERGER, LLP, )  
Defendants ) Page 1-239  
-----X

DEPOSITION OF ROBERT D. LUSKIN  
Wednesday, January 18, 2017  
Washington, DC

Reported by: Sherry L. Brooks, CLR  
Job No. J0504403

ROBERT D. LUSKIN  
MATTHEW BISSONNETTE V. KEVIN PODLASKI

January 18, 2017  
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January 18, 2017

9:30 a.m.

Deposition of Robert D. Luskin was held at:

Paul Hastings, LLP

875 15th Street, NW

Washington, DC 20005

Pursuant to notice, before Sherry L. Brooks,  
Certified LiveNote Reporter and Notary Public, in and  
for the District of Columbia.

ROBERT D. LUSKIN  
MATTHEW BISSONNETTE V. KEVIN PODLASKI

January 18, 2017  
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12 ALSO PRESENT:

13 Casey Miller, Associate - Paul Hastings

14

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## P R O C E E D I N G S

\* \* \* \* \*

ROBERT D. LUSKIN

was called for examination by counsel and, after having been duly sworn by the Notary, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MR. FURMAN:

Q. Good morning, Mr. Lusk. Let me introduce myself once again. My name is Michael Furman, and I represent Kevin Podlaski and the law firm Carson Boxberger in this lawsuit filed by Mr. Bissonnette.

Hello.

A. Good morning.

Q. Good morning. If I ask you any questions that you don't understand, please let me know. And I have to ask that you verbalize your answers.

A. Thank you. I will.

Q. Are you familiar with the Bissonnette versus Carson Boxberger lawsuit?

A. Generally speaking, I would say.

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Q. And how are you aware of it?

A. I've had conversations with Robert Tobey and Randy Johnston, who are Mr. Bissonnette's lawyers. And I think that I've seen the complaint in that matter. I'm not sure that I've seen any other pleadings.

Q. Have you done any legal work in support of that civil lawsuit?

A. No, not -- not per se. Randy has called me, from time to time, just to talk through issues. And we talked about those, but I've not done anything -- you know, I've not drafted any pleadings. I've not reviewed documents. I've not done any legal research or anything of the sort.

Q. The reason I'm asking you this question is because, if I understand your answer, you're saying that you didn't draft or review any documents?

A. That's correct.

Q. I've had an opportunity to review your billing, and there were several instances when -- and I'll show them to you later in this deposition --

A. Sure.

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Q. -- where Mr. Johnston or Mr. Tobey had sent to you copies of pleadings and various discovery items and --

A. It's certainly possible, Mr. Furman. I know that I would have seen a draft of the complaint and that was significant to me because I didn't want any factual representations made because that was in a period of time when the matter for which I was principally responsible was still alive and it was important to me that there not be any factual assertions made there that were inconsistent with representations that we had made through the government.

Q. Understood.

A. But I guess in saying reviewing pleadings, I understand that there's been motions practice in this case. And I've not been involved in that.

Q. Okay. I'm going to ask you several questions about the book. And if I reference the book, we're talking about the book, "No Easy Day"?

A. Right.

Q. I'll try to use the term, "No Easy Day."

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But if I just reference the book, just so it's understood, I am referencing, "No Easy Day."

A. I understand.

Q. The -- turning to "No Easy Day," if the book had been submitted for a prepublication review, would it have been cleared for publication?

A. Well, based on what the government said to me in the course of Mr. Bissonnette's two interviews with them, there were a number of specific matters that they thought improperly disclosed training tactics and procedures or sensitive or classified information.

So it is my sense that the vast majority of what is said in the book would have been cleared, but there would have been specific deletions that would have been made.

Q. Who told you that?

A. I mean, you're asking my judgment. I guess what I'm saying is that the government went through a list of things that they regarded as potentially sensitive or revealing training tactics and procedures. The list was not particularly long.

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1 In answering your question, I'm assuming  
2 that had the book been submitted to the Office for  
3 Prepublication Security Review (sic) that the same  
4 things that the government subsequently identified to  
5 me would have been identified in the context of that  
6 review, and they would have been redacted -- and the  
7 government would have required that those references  
8 be redacted. But that's making an assumption.

9 Q. And I want to explore that assumption.

10 A. Sure.

11 Q. Do you know who the book should have been  
12 submitted to?

13 A. It should have been submitted to an entity  
14 within DOD, which is known by its acronym, OPR, the  
15 Office of Prepublication and Security Review.

16 Q. And is there a specific person that was in  
17 charge of the OPR and was there a staff that you're  
18 aware of?

19 A. There certainly was someone in charge and  
20 there was a staff. There's a formal process for  
21 submission.

22 Q. Okay. And have you ever spoken to anyone

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1 at the OPR?

2 A. I have. In March of 2013, I learned that  
3 Mr. Bissonnette had started to give paid speeches  
4 talking about leadership and his experience in the  
5 SEALS. And I advised him at that time that the slide  
6 deck that he was using needed to be submitted for  
7 prepublication and review.

8 And so I submitted those slides on his  
9 behalf in the middle of March of 2013. And about a  
10 month or a little less than a month later the  
11 government approved those slides with minor  
12 redactions for disclosure so that he could use them  
13 publicly.

14 So in the course of that process I made a  
15 submission to the office on his behalf. Someone  
16 contacted me and identified themselves as the  
17 individual who was responsible for supervising the  
18 review of that matter.

19 And then they have their own internal  
20 processes by which they consult with other entities  
21 within DOD to get their input on whether or not the  
22 particular content of whatever is submitted contains

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1 information that would be sensitive or classified.

2 Q. Do you know what factors the OPR  
3 considers when making a determination as to whether  
4 any publication that's submitted by a military  
5 employee subject to an SCI agreement, what factors  
6 are considered?

7 MR. PATRIZIA: Object to form.

8 I'll permit the witness to answer.

9 BY MR. FURMAN:

10 Q. Do you understand the question?

11 A. I think that I do. And it's my  
12 understanding that the processes objective in the  
13 sense that they consult with the relevant entity  
14 within DOD to ask the question, is there material in  
15 whatever this is, a movie script, a book manuscript,  
16 a slide deck, in this instance, that contains  
17 sensitive or classified information.

18 And the answer to that question ought to  
19 be a relatively objective one, which is to say, there  
20 is a process by which the government determines what  
21 information is sensitive or classified. And a  
22 particular piece of information either is or it

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1 isn't.

2 That process has certainly been criticized  
3 by outsiders as being not as objective as it ought to  
4 be. But in theory, it's an objective process.

5 Q. And I was conscious of the fact that you  
6 used the phrase that, "it ought to be objective."

7 Is there potentially a political aspect to  
8 that review that you're aware of?

9 MR. PATRIZIA: Object to form.

10 I'll permit the witness to answer.

11 A. Again, not in my experience, meaning the  
12 slides that we submitted on behalf of Mr. Bissonnette  
13 and in other matters that I've been involved in have  
14 seemed to me to be relatively straightforward.

15 And -- but I'm aware that the  
16 classification process generally is subject to public  
17 criticism for potentially being a politically  
18 motivated process.

19 I have not had personal experience with  
20 evidence of that.

21 BY MR. FURMAN:

22 Q. The slides that you referenced that you

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1 became aware of in March of 2013, did they involve  
2 any information that either directly or indirectly  
3 relates to Operation Neptune Spear?

4 A. My recollection is that they did generally  
5 refer to the mission, but not in any specific detail.

6 Q. Now, in connection with, "No Easy Day," do  
7 you know who at the OPR would have been the  
8 decision-maker in terms of deciding whether the book  
9 was permissible?

10 A. No, I don't.

11 Q. Okay. And do you know the process, the  
12 factors, that the OPR would have considered had the  
13 book been submitted for prepublication review at any  
14 point before Mr. Johnson's letter -- Jeh Johnson's  
15 letter?

16 A. Well, I think I've just described it to  
17 you.

18 I mean, my understanding is that they then  
19 -- that when the OPR gets a document of some kind  
20 submitted for prepublication review it is reviewed to  
21 the relevant entity, depending on what the subject  
22 matter of it is.

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1 And that entity comes back to OPR and  
2 identifies any specific matters that they think are  
3 potentially problematic.

4 There's some process within OPR by which  
5 they make a determination of what they're going to  
6 do. They then come back to the author and indicate  
7 what changes they want to see made.

8 And then typically in that process, in my  
9 experience, there is frequently some give-and-take.  
10 So, for example, not in this matter, but in another  
11 matter they identified something that they said was  
12 classified.

13 We found a pleading that the government  
14 filed in a publicly-filed case in which they  
15 specifically discussed the matter that had been  
16 identified as classified. And the government receded  
17 and said, well, then that's fine; you can leave that  
18 in.

19 In other situations, the government takes  
20 the position that even material that has been in the  
21 public record if it was classified still remains  
22 classified, even if it was leaked.

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1 And so in those instances, what often is  
2 done is that, rather than have the individual state  
3 that as the product of his own experience or  
4 observation, a reference is simply made to a public  
5 source.

6 So instead of saying this happened on that  
7 day, which would be improper, the OPR would permit  
8 you to say The Washington Post has reported that this  
9 happened on that day.

10 And so with that sort of change, things  
11 are then permitted. So there's typically a  
12 give-and-take process. And then the statutes and  
13 regulations permit the issues to be adjudicated in  
14 court, but that typically doesn't happen.

15 Q. Okay. And turning, just for a moment, to  
16 operation Neptune Spear. Did you at some point come  
17 to learn that Operation Neptune Spear was a  
18 top-secret mission?

19 A. Yes, I did.

20 Q. And when did you learn that?

21 A. I learned that in my first conversations  
22 with representatives of the defense department

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1 following Mr. Johnson's letter.

2 Q. And that was -- and your first  
3 conversations -- let me just strike that.

4 We'll be asking several questions about  
5 that.

6 A. Sure.

7 Q. So I'm going to come back to those  
8 conversations. But let me just ask you because of  
9 this -- I want to focus on the top-secret element of  
10 Operation Neptune Spear.

11 Those conversations with the government  
12 took place around the time of your letter responding  
13 to Jeh Johnson shortly after August 31st of 2012,  
14 correct?

15 A. That's correct.

16 MR. PATRIZIA: Just a note, Jeh Johnson is  
17 actually, J-E-H, not, J-A-Y.

18 MR. FURMAN: Thank you.

19 BY MR. FURMAN:

20 Q. Now, if the book had been submitted to the  
21 OPR before Jeh Johnson's letter of August 30th,  
22 2012, do you have any knowledge, one way or the

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1 other, whether the OPRS then would have submitted the  
2 book to the CIA for review?

3 A. I don't think that -- it might have been  
4 submitted to the CIA. I don't know. I think it  
5 would certainly in the first instance have been  
6 submitted to the Naval Special Warfare Command, which  
7 carried out the mission.

8 Whether they would have consulted with the  
9 CIA, I simply don't know.

10 Q. Okay. I want to start just marking a few  
11 exhibits.

12 MR. FURMAN: Mr. Tobey, we're at 110.

13 MR. TOBBY: 111 is the new exhibit.

14 MR. FURMAN: Oh, okay. Can I have the  
15 complaint?

16 (Exhibit Number 111 was marked for  
17 identification and was attached to the deposition.)

18 BY MR. FURMAN:

19 Q. Mr. Luskin, have you seen Exhibit 111  
20 prior to today?

21 A. Yes, I have.

22 Q. It's a copy of the Eastern District



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1 complaint against Mr. Bissonnette that was filed on  
2 August 20th of 2016.

3 Were you representing Mr. Bissonnette at  
4 that time?

5 A. Yes, I was.

6 Q. And were you representing Mr. Bissonnette  
7 in connection with this complaint?

8 A. Yes, I was.

9 Q. Now, in the complaint, the -- in the  
10 factual allegations -- and I'm turning now to  
11 paragraphs that start with Number 5 -- it states that  
12 Mr. Bissonnette signed four documents:

13 First, a classified information  
14 nondisclosure agreement, which is known as a CINA,  
15 C-I-N-A; second, that he signed a sensitive  
16 compartmented information nondisclosure statement,  
17 otherwise known as an SCI; third, that he signed a  
18 sensitive compartmented information indoctrination  
19 memorandum; and four, that he signed a personal  
20 attestation stating that he understood his  
21 responsibility to protect clarified and national  
22 security information.



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1 Do you see that?

2 A. Yes, I do.

3 Q. Were you aware that Mr. Bissonnette had  
4 signed those documents at the time that you were  
5 writing to Mr. Johnson on August 31st of 2012?

6 A. I was certainly aware of 1 and 2 because  
7 those were included as attachments to Mr. Johnson's  
8 letter. I am not sure whether or not I knew at that  
9 time about item 3, the indoctrination memorandum, or  
10 item 4, the personal attestation.

11 Q. Okay. Turning to paragraph Number 7 of  
12 the complaint, it states that, quote, in signing the  
13 SCI nondisclosure statement, Bissonnette expressly  
14 agreed to a prepublication requirement.

15 Specifically, he agreed to submit to the  
16 government for prepublication security review any  
17 writing or other preparation in any form that  
18 contains or purports to contain SCI or a description  
19 of activities that produce or relate to SCI.

20 Do you see that?

21 A. Yes, I do.

22 Q. Were you aware of that requirement at the



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1 time that you wrote the letter to Mr. Johnson on  
2 August 31st of 2012?

3 A. Yes, I was. As I said, I'd seen a copy of  
4 the signed agreement as an attachment to Mr.  
5 Johnson's letter.

6 Q. Now, at the time that you sent the letter  
7 to Mr. Johnson, did you undertake any efforts to  
8 determine whether or not the book, "No Easy Day,"  
9 contained information that described activities that  
10 either produce or relate to SCI?

11 MR. PATRIZIA: Object to the form. You  
12 may want to be clear as to what your reference to,  
13 "the letter" is.

14 MR. FURMAN: Yes. Why don't I mark that  
15 as an exhibit so we can use that? And thank you, Mr.  
16 Patrizia. That's a good idea.

17 Just so that I have a bit of order to  
18 things, I'm going to mark the consent decree as the  
19 next exhibit and then I'll mark the letter so that we  
20 can reference it for ease. Thank you for that.

21 (Exhibit Number 112 was marked for  
22 identification and was attached to the deposition.)



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1 BY MR. FURMAN:

2 Q. Mr. Luskin, I'm showing you what's been

3 marked as Exhibit Number 112, which is the consent

4 decree.

5 Do you recall receiving that consent

6 decree on or about August 19th of 2016?

7 A. I did.

8 Q. Did you participate in the --

9 MR. PATRIZIA: Sorry. Would you read that

10 back, please?

11 (The reporter read back the requested

12 testimony.)

13 MR. TOBEY: My question is -- this one is

14 not signed by the judge. Do we have one that's

15 signed by the judge?

16 MR. FURMAN: I don't know if I have a copy

17 of that.

18 MR. TOBEY: I presume it was signed by the

19 judge at some point.

20 A. Yes, it was.

21 MR. TOBEY: I think we can proceed on that

22 basis knowing that it was signed.

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1 MR. PATRIZIA: I have no problem with

2 that. I know the decree was entered.

3 BY MR. FURMAN:

4 Q. So just turning to document Number 112,

5 did you participate in the negotiation with the U.S.

6 Government in connection with this consent decree?

7 A. Yes, I did.

8 Q. And is that your signature on the last

9 page on behalf of Mr. Bissonnette?

10 A. It is, indeed.

11 Q. And that's also Mr. Bissonnette's

12 signature as well?

13 A. Right, directly above mine. That's

14 correct.

15 Q. So we're going to turn to the consent

16 decree and the complaint in -- momentarily. I just

17 want to show you the Jeh Johnson letter, which has

18 been previously marked as Exhibit 1 in this case.

19 MR. TOBEY: If you prefer, I think I have

20 a clearer copy.

21 A. It probably would be nice to have one

22 that's intelligible, just for the hell of it.

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1 MR. FURMAN: So this will be marked as

2 Exhibit 113.

3 (Exhibit Number 113 was marked for

4 identification and was attached to the deposition.)

5 BY MR. FURMAN:

6 Q. Mr. Luskin, I'm showing you what's been

7 marked as Exhibit 112. This is your letter dated

8 August 31st, 2012?

9 A. The consent decree is 112. So my letter

10 is 113?

11 MR. FURMAN: 113, yes.

12 MR. PATRIZIA: And I note the copy I've

13 been provided has several emails on the back, so it's

14 more than just the letter itself. I don't have a

15 problem with that. I'm just noting it for the

16 record.

17 MR. FURMAN: No. That shouldn't be the

18 case, so I really just want the letter. So maybe I

19 can just have that exhibit back and then --

20 MR. PATRIZIA: We can just remove the last

21 two emails.

22 MR. FURMAN: Thank you. I appreciate

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1 that. Thank you, Mr. Patrizia. You're being so

2 helpful to me. I might have to split my fee with

3 you.

4 BY MR. FURMAN:

5 Q. So we're focused now so far on Exhibit

6 Number 113, which is, Mr. Luskin, your letter dated

7 August 31st, of 2012.

8 That letter was in response to Mr. Jeh

9 Johnson's letter to Mark Owen, otherwise known as --

10 who we now know is Matthew Bissonnette, on August

11 30th of 2012, correct?

12 A. That's correct.

13 Q. I know you've got four documents in front

14 of you. I want to start going back now to the

15 complaint.

16 At the time that you had drafted the

17 August 31st letter, which is marked as Exhibit 113,

18 were you aware, as I had previously mentioned in

19 paragraph Number 7 of the consent decree -- I'm sorry

20 -- of the complaint, that Mr. Bissonnette had agreed

21 to submit to the government for a prepublication

22 review any writing that contains or purports to

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1 contain SCI or a description of activities that  
2 produced or relate to SCI?

3 A. Well, paragraph 7 is a paraphrase of the  
4 SCI agreement. And I had seen the SCI agreement  
5 because it was attached as an exhibit to Exhibit 1,  
6 Mr. Johnson's letter.

7 Q. Right. Okay. And were you aware of --  
8 and I agree with you that that -- paragraph 7 is  
9 paraphrasing the actual wording of the SCI form,  
10 which is otherwise known, I think, in the government  
11 as Form 1847.

12 A. Um-hum.

13 Q. I just want to make sure that you were  
14 aware of that requirement before you sent the letter  
15 to Jeh Johnson on August 31st of 2012?

16 A. Yes, I was.

17 Q. You made a reference earlier -- and I just  
18 want to explore that for a moment -- of experience  
19 when dealing with the OPSR.

20 I'm certainly not going to ask you any  
21 information that's privileged. Can you just in a  
22 general way explain to me what that experience is?

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1 A. I represented probably about a half dozen  
2 clients who have had issues involving prepublication  
3 review and have also represented publishers who had  
4 an interest in manuscripts that were being submitted  
5 for prepublication review.

6 Q. And did those half dozen matters, did they  
7 predate August 30th of 2012?

8 A. Most did and a couple were after,  
9 including my specific experience with Mr. Bissonnette  
10 in connection with his slide deck.

11 Q. Is there any kind of specialized training  
12 that you're aware of that you -- a lawyer would need  
13 in order to represent a client in connection with  
14 dealing with the prepublication review process?

15 A. I'm not aware of any particular training.  
16 There are governing statutes and regulations and  
17 scant case law that a lawyer would want to  
18 familiarize himself or herself with.

19 I'm not aware of any particular training  
20 in that area.

21 Q. In those instances that you represented a  
22 client in connection with a matter before the OPSR,

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1 was it your experience that there was a give-and-take  
2 with the OPSR about what material could be or could  
3 not be published?

4 A. Yes.

5 Q. And what factors -- without revealing  
6 anything that is privileged, what factors are  
7 considered in that negotiation with the OPSR?

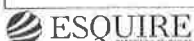
8 MR. PATRIZIA: Objection. Asked and  
9 answered.

10 But I'll permit the witness to answer.

11 A. As I think I said before, the standard is  
12 meant to be an objective one, which is, is this  
13 information sensitive or classified?

14 And then the negotiation generally centers  
15 around the question of whether or not the information  
16 has either been declassified or whether the  
17 government, for example, has published the  
18 information in some other form, even if it hasn't  
19 been formally declassified.

20 So in the example I gave you before, we  
21 identified a pleading filed by the Federal Government  
22 in a public case where they specifically made

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1 reference to the issue that -- in that matter the  
2 government was claiming was classified.

3 And when we showed them the pleading, OPSR  
4 then receded and then said, well, in that case, you  
5 can leave that in.

6 BY MR. FURMAN:

7 Q. In connection with Operation Neptune  
8 Spear, were you aware in early 2012 and perhaps even  
9 in late 2011 a writer named Nick Schmittle,  
10 S-C-H-M-I-D-D-L-E, wrote a piece for The New Yorker  
11 that described in detail Operation Neptune Spear?

12 A. Yes. I'm aware of it and had certainly  
13 read it at the time it was published.

14 Q. And did you make any judgments at the time  
15 whether or not that it was proper or improper for  
16 whatever source or sources provided Mr. Schmittle  
17 with that information, whether that was appropriate?

18 A. It certainly seemed to me from reading the  
19 story that he had obtained information from  
20 individuals who were required by law -- including,  
21 but not limited to, an SCI agreement, who were  
22 required by law to keep that information

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1 confidential.

2 And while under the First Amendment Mr.  
3 Schmittle might not be liable for that disclosure,  
4 those individuals might be.

5 Q. Were you aware -- and this is at the time  
6 that you read the article and maybe shortly  
7 thereafter -- whether any government officials were  
8 investigating that disclosure to Mr. Schmittle?

9 A. You know, I'm aware throughout that period  
10 of time that there were various inquiries about  
11 various leaks associated with Operation Neptune  
12 Spear, including, but not limited to, Mr. Schmittle's  
13 article.

14 Q. And I want to know if you recall this, if  
15 you recall that Congressman King, from the great  
16 State of New York, had led an inquiry into the  
17 disclosure of confidential or classified information  
18 that related to Operation Neptune Spear at the time  
19 of that publication in the New Yorker?

20 A. You know, I don't recall a specific  
21 inquiry by Congressman King. I might have been at  
22 the time. But as I sit here now, I don't recall it.

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1 Q. When did you first learn that one of the  
2 operators on that mission, Operation Neptune Spear,  
3 was planning to write a book that would be a  
4 firsthand account of that operation?

5 A. You know, I think it was probably in the  
6 days immediately preceding Mr. Johnson's letter,  
7 Exhibit 1. In a week or ten days before then, there  
8 were stories in the paper about the impending  
9 publication of, "No Easy Day."

10 And there was some discussion in the media  
11 about whether that was appropriate. And I recall  
12 having seen them in the various media sources in the  
13 days immediately preceding August 30 of 2012.

14 Q. And in general terms, the appropriateness  
15 of whether the book should be published or not, did  
16 that center on the same factors that centered on the  
17 sources divulging information to Mr. Schmittle; in  
18 other words, giving information about a classified  
19 operation?

20 MR. TOBEY: Objection. Form.

21 BY MR. FURMAN:

22 Q. Did you understand the question?

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1 A. I think I did. And I guess I would say  
2 that my recollection, and it's an indistinct one, is  
3 that there was discussion about; first, whether or  
4 not the book revealed sensitive or classified  
5 information; second, there was discussion about  
6 whether or not it was appropriate for members of the  
7 Special Forces to write about their combat  
8 experiences.

9 And third, you know, in the fall of 2012  
10 immediately before the election, there was also a  
11 general discussion along party lines about whether or  
12 not the administration was deliberately leaking  
13 information and encouraging the publication of books  
14 and articles and movies about the operation in order  
15 to help the reelection of President Obama.

16 So the dispute really revolved around a  
17 number of different issues.

18 Q. And in connection with the political  
19 aspect of it, at the time that you first learned  
20 about the book, "No Easy Day," that was roughly in  
21 the summer of 2012?

22 A. You know, as I said, I recall having read

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1 or seen things in the days immediately preceding the  
2 letter. When I first, sort of, heard about, "No Easy  
3 Day," or the book, I honestly can't tell you that  
4 because it simply wasn't on my radar screen until I  
5 got called and was asked to be involved.

6 Q. When did you first get a call to be  
7 involved?

8 A. It would have been the night of August the  
9 30th.

10 Q. Who called you?

11 A. Mark Fabiani.

12 Q. How do you know Mark Fabiani?

13 A. Mark is a lawyer who was in The White  
14 House counsel's office during the Clinton  
15 Administration.

16 And during the various Clinton wars in the  
17 mid and late '90s, I represented a number of senior  
18 officials in The White House and also had agreed to  
19 be a sort of surrogate for The White House, kind of  
20 going out and talking publicly about some of those  
21 things.

22 And I got to know Mark then. And then

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1 immediately preceding August of 2012, I had then last  
2 worked with him in connection with my representation  
3 of Lance Armstrong. So I had known Mark for 20  
4 years.

5 Q. And how did he contact you? Was it via  
6 text message or a call or an email? How was that?

7 A. He called my cell phone.

8 Q. What did he tell you?

9 A. He told me that he represented Matt  
10 Bissonnette; that he had been brought into the matter  
11 relatively recently to help Matt and the publisher  
12 deal with the emerging controversy over the  
13 publication of the book; that they had received a  
14 letter from Mr. Johnson, which he was then going to  
15 try and send to me; and that the letter raised --  
16 made specific threats about litigation and he  
17 believed implied threats of potential criminal  
18 liability that made he (sic), Mark, believe that Matt  
19 needed a lawyer with my skill set.

20 And he asked if I would become involved on  
21 Mr. Bissonnette's behalf.

22 Q. And Mr. Fabiani is an attorney, correct?

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1 A. He is, indeed.

2 Q. And he told you that he represented Mr.  
3 Bissonnette?

4 A. That's right.

5 Q. Do you know what the scope of Mr.

6 Fabiani's representation was of Mr. Bissonnette at  
7 that time?

8 A. Not precisely. I knew only what he told  
9 me, which was that he had been brought in to help  
10 deal with the public controversy that was surrounding  
11 the publication of the book.

12 Mark's expertise coming out of the White  
13 House was in crisis management, and so he tended to  
14 become involved in cases where he could use his skill  
15 set as both a lawyer and as a crisis manager.

16 And that was also the role he played in  
17 the Armstrong case.

18 Q. Do you know whether or not Mr. Fabiani was  
19 brought into the matter through Mr. Bissonnette's  
20 agent Elyse, E-L-Y-S-E, Cheney, C-H-E-N-E-Y?

21 A. I don't recall him telling me at the time  
22 who precisely had contacted him or how exactly he had

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1 become involved.

2 Q. Now, I just want to stagger back to the  
3 complaint, Exhibit 111, because I might forget to ask  
4 a question about that.

5 If I can turn your attention to paragraph  
6 13 --

7 A. Of the complaint?

8 Q. Of the complaint, yes -- it states that,  
9 quote, on April 20th, 2012, Bissonnette signed an SCI  
10 debriefing memorandum, documenting that he was again  
11 reminded of his continuing obligation to comply with  
12 the terms of the SCI nondisclosure statement that he  
13 signed previously.

14 Do you see that?

15 A. Yes, I do.

16 Q. When did you first become aware that Mr.  
17 Bissonnette signed an SCI debriefing memorandum?

18 A. I think that that was in connection with  
19 one of the two proffer sessions that Mr. Bissonnette  
20 subsequently had with prosecutors from the Department  
21 of Justice, so that would have been in the fall of  
22 2014.

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1 Q. Up until that time prior to the fall of  
2 2014, did Mr. Bissonnette tell you that he had signed  
3 a debriefing memorandum on April 20th of 2012?

4 A. I don't recall.

5 Q. Do you know whether there's any  
6 significance to that particular date, April 20th of  
7 2012?

8 A. I think that that date was at or around  
9 the time that he was formally discharged from the  
10 Navy.

11 Q. And he, being Mr. -- of course, Mr.  
12 Bissonnette?

13 A. Mr. Bissonnette, yes. I'm sorry.

14 Q. Your job is to answer questions. My job  
15 is to make sure to keep track of the information, and  
16 Mr. Patrizia is here to help me. I'm only kidding  
17 about that. Okay. So thank you for that.

18 Now, just turning back to the time that  
19 you were -- you received the call from Mr. Fabiani,  
20 what's the next thing that you did in connection with  
21 this matter?

22 A. You know, there were a series of phone

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1 calls that night and the next morning about how to  
2 respond and what could reasonably set (sic).  
3 Q. And what -- I'm sorry -- strike that.  
4 Did you have a separate conversation with  
5 Mr. Bissonnette on August 30th of 2012?  
6 A. I don't know that I had a one-on-one  
7 conversation with Mr. Bissonnette on August 30th or  
8 August 31st. I don't recall.  
9 Q. Did you have a conversation with him where  
10 others were on the call?  
11 A. Yes. There were certainly at least one  
12 and maybe more conversations involving him, Mr.  
13 Podlaski, and perhaps Mr. Fabiani.  
14 Q. My recollection -- and I'll show you a  
15 series of emails so that it will help you with your  
16 recollection.  
17 But my recollection is that you received  
18 the news of the Jeh Johnson letter in the evening of  
19 August 30th of --  
20 A. That's correct.  
21 Q. And that was the Thursday before the Labor  
22 Day weekend. Is that fair? I'm forgetting.

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1 A. That sounds about right.  
2 Q. It might help to just have some of the  
3 emails marked, so let me just get ahold of them.  
4 MR. FURMAN: Document 114 will be a series  
5 of emails that are in hardcopy form that were  
6 produced to us under LUS4519 through 4521.  
7 (Exhibit Number 114 was marked for  
8 identification and was attached to the deposition.)  
9 BY MR. FURMAN:  
10 Q. I wonder, Mr. Lusk, did I give you my  
11 copy that has yellow markings on it? Probably not.  
12 A. No. I don't see any markings on this, Mr.  
13 Furman.  
14 Q. Sorry. I have it.  
15 If you don't mind just to turn your  
16 attention to the first page ending in 4519. At the  
17 middle of the page, there's an email at 9:13 p.m.  
18 dated August 30th of 2012.  
19 And it states -- it's from Elyse Cheney  
20 stating: "Bob, I thought you should see some of the  
21 opinions sent to us by Kevin Podlaski regarding this  
22 matter prior to this new development."

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1 And the email attaches a previous email  
2 dated August 28th of 2012 from Mr. Podlaski to Elyse  
3 Cheney and to Mr. Bissonnette?  
4 MR. PATRIZIA: I note that the -- we  
5 agreed that the CC to Mark Owen is to Mr.  
6 Bissonnette. But I just want to have the record  
7 clear that the CC is to Mr. Owen and not to Mr.  
8 Bissonnette.  
9 BY MR. FURMAN:  
10 Q. Do you see that?  
11 A. I do see that.  
12 Q. And I agree with Mr. Patrizia's comment.  
13 And just so that the record is clearer, the email  
14 address is for Markowen123456@gmail.com.  
15 And I will represent to you, Mr. Lusk, in  
16 that that is one of Mr. Bissonnette's email  
17 addresses.  
18 A. And I know that to be the case.  
19 Q. Do you recall receiving that email from  
20 Ms. Cheney on August 30th of 2012 at 9:13 p.m.?  
21 A. You know, I don't have a present  
22 recollection of it, but I have no reason to doubt

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1 that I received it at the time.  
2 Q. Did you speak to Ms. Cheney before  
3 receiving that email? The reason I ask is that the  
4 email -- it suggests familiarity with you.  
5 A. Right. And so my assumption is that this  
6 follows an initial conversation or two or three  
7 conversations involving some of the folks who were  
8 interested and involved in this matter.  
9 Q. Who would they be, just so I know who  
10 those people were?  
11 A. I think the cast of characters would  
12 likely be Matt Bissonnette, Mark Fabiani, Elyse  
13 Cheney, Alex Gigante, who is general counsel for the  
14 publisher, and your client, Mr. Podlaski.  
15 Q. Was a lawyer from Cahill Gordon involved  
16 at that point in time?  
17 A. I don't recall anybody from Cahill.  
18 Q. Do you know whether or not Cahill  
19 represented Penguin or Dutton in connection with the  
20 Jeh Johnson letter?  
21 A. I don't recall having any dealings with  
22 Cahill.

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1 MR. TOBEY: Are you referring to Mr.  
2 Ragone?  
3 MR. FURMAN: No. No. I'll get to that.  
4 BY MR. FURMAN:  
5 Q. In a minute or two maybe after Mr.  
6 Patrizia gets a chance to stretch, I'll show you the  
7 emails that prompted my question to you about that.  
8 A. Okay.  
9 Q. In perhaps one or two of the conversations  
10 that you mentioned with that cast of characters  
11 involved, what do you recall the conversations to be  
12 about?  
13 A. Well, the conversations centered around  
14 two issues. One was how and when and in what form a  
15 response should be made to Jeh Johnson, and the  
16 second was the underlying facts so that such a  
17 response could be prepared.  
18 Q. Now, in connection with those two issues,  
19 do you recall what Mr. Podlaski said about what the  
20 response should be?  
21 A. Yes.  
22 Q. What do you recall him saying?

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1 A. Well, I recall Kevin saying two things:  
2 First of all, that he was quite sure that the book  
3 did not contain classified information and that he  
4 had reviewed it carefully for that purpose and that  
5 he was comfortable that the book was clear, if you  
6 will.  
7 And the second was his explanation to me  
8 of why prepublication review was not required. And  
9 that explanation is reflected in the last full  
10 paragraph on the first page of Exhibit 113, the  
11 letter back to Mr. Johnson.  
12 Q. Now, the first part of what Mr. Podlaski  
13 told you, that he was confident the book contained no  
14 classified information, do you know what basis he  
15 would have had to say that?  
16 A. He told me that he had reviewed the  
17 manuscript for that purpose.  
18 Q. Based on your experience, would you have  
19 to have had access to the details of Operation  
20 Neptune Spear in order to make an assessment as to  
21 whether the book contained classified information or  
22 not?

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1 A. I think ultimately to make a final  
2 determination, you would. I mean, at the end of the  
3 day, if you will, an A/B comparison -- you need A to  
4 set it alongside B, if that makes sense.  
5 Q. Yeah. And just to expand on that just for  
6 a moment, in order for Mr. Podlaski or anyone to make  
7 a judgment that the book did not contain classified  
8 information, wouldn't they have to have had access to  
9 classified information about Operation Neptune Spear  
10 in order to make that determination?  
11 A. I think certainly to make it with 100  
12 percent degree of certainty one could certainly  
13 review public record sources and where you see  
14 particular pieces of information in widespread  
15 circulation have a reasonably high degree of  
16 confidence that that information is not classified.  
17 But I don't think you could make a determination to  
18 100 percent degree of certainty.  
19 Q. And in order to protect Mr. Bissonnette,  
20 do you think it would have been appropriate to be 100  
21 percent certain, of course, that the book did not  
22 contain classified information?

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1 A. Well, you know, in order to protect Mr.  
2 Bissonnette to a 100 percent degree of certainty, one  
3 would have needed to go through the OPSR process.  
4 Q. Now, the other aspect of the conversations  
5 that took place with the characters we described  
6 before had to do with the factual background, the  
7 context of what was taking place.  
8 What information do you recall receiving  
9 about the factual background and the context of what  
10 was taking place that preceded Mr. Johnson's letter?  
11 A. Well, I had some understanding that there  
12 had been some issues -- public issues involved in  
13 this.  
14 But by factual background there, most of  
15 it came through, I think, Elyse Cheney and Mr.  
16 Podlaski talking to me about the fact that Mr.  
17 Bissonnette had retained Mr. Podlaski in order to get  
18 advice about what his obligations were and that Mr.  
19 Podlaski had also agreed to review the manuscript to  
20 try to ensure that it did not contain classified  
21 information.  
22 And we talked about when that had taken

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1 place and what generally had been done and then the  
2 specific details of Mr. Podlaski's analysis of the  
3 SCI agreement and whether, in this circumstance, it  
4 required a submission of the manuscript for  
5 prepublication review.

6 Q. Did you make any judgments at that time  
7 whether it was appropriate, one way or the other, for  
8 Mr. Podlaski to review the manuscript himself?

9 A. No, I didn't because my overriding concern  
10 at this point, given the tone of Mr. Johnson's letter  
11 and the explicit threat at the end of that letter,  
12 was to respond as quickly as possible in a way that  
13 did not force the government's hand into premature  
14 litigation against Mr. Bissonnette or a criminal  
15 referral to the Department of Justice.

16 And so it was of primary importance to me  
17 that there was substantial evidence that Mr.  
18 Bissonnette had been acting in good faith, had sought  
19 the advice of counsel, and had received assurances  
20 about what the appropriate course had been, and that  
21 he was not, if you will, a bomb thrower or someone  
22 who was trying to hurt the Special Forces or the

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1 interests of the United States.

2 And that seemed to me, above all else, the  
3 message that needed to be conveyed back to Mr.  
4 Johnson personally and also publicly in order to  
5 diffuse the temperature, if you will.

6 Q. In connection with that, diffusing the  
7 temperature, in Mr. Johnson's letter of August 30th  
8 that is Exhibit 1 in this matter, the second  
9 paragraph of that letter, and specifically the last  
10 sentence of that letter -- of that paragraph states:  
11 "Further public dissemination of your book will  
12 aggravate your breach and violation of your  
13 agreements."

14 Do you see that?

15 A. Yes, I do.

16 Q. And addressing the need to reduce the  
17 temperature, as you've described it, did you consider  
18 advising Mr. Bissonnette to halt or comply with Mr.  
19 Johnson's request and stop further public  
20 dissemination of, "No Easy Day"?

21 A. You know, I don't think we talked about it  
22 at that time. And I understood from the

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1 conversations with the publisher, who participated in  
2 these chats on the night of the 30th and during the,  
3 day on the 31st before my return letter went back  
4 that the decision about what to do with the book was  
5 really no longer Mr. Bissonnette's, if you will.

6 He had complied with his obligation to  
7 submit a manuscript to the publisher. And at that  
8 point the decision about how or whether or when to  
9 publish the book was the publisher's decision, not  
10 Mr. Bissonnette's.

11 And I don't mean to suggest that their  
12 interests were adverse, but I want to be clear that  
13 my understanding that evening was that it was not a  
14 decision that was unilaterally within his control.

15 Q. So I understand, in the conversations that  
16 you had when you were first engaged in this matter,  
17 the conversations included the publisher in those  
18 discussions about what to do in response to Jeh  
19 Johnson's letter, correct?

20 A. That's right.

21 Q. And your responsibility, of course, was to  
22 Mr. Bissonnette?

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1 A. That's correct.

2 Q. And only Mr. Bissonnette, correct?

3 A. That's correct.

4 Q. And the general counsel of the Department  
5 of Defense was clearly stating that further public  
6 dissemination of the book was an aggravation of what  
7 they considered to be Mr. Bissonnette's breach and  
8 violation of his agreements, correct?

9 A. That's correct.

10 Q. And did you consider, irrespective of the  
11 publisher's control or decision-making, whether or  
12 not Mr. Bissonnette could simply comply with Mr.  
13 Johnson's directive and request that the publisher  
14 halt the dissemination of the book?

15 A. I certainly began considering at that time  
16 what Mr. Bissonnette could do personally and at the  
17 time -- early in the following week when I met  
18 personally with Mr. Johnson, made the representation  
19 on behalf of Mr. Bissonnette that he would not take  
20 any steps to publicize the book, promote its  
21 publication, give interviews, or in any other way  
22 participate in the circulation of the book.

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1 The question of whether to ask the  
2 publisher to withdraw the book was certainly on my  
3 mind. But before that decision was finally made,  
4 having met with Mr. Johnson early the next week, he  
5 made clear at that meeting that, if you will, the  
6 genie was out of the bottle.

7 And from the department's perspective, it  
8 was too late to pull back the book and mitigate risk  
9 to Mr. Bissonnette through that process.

10 Q. The publication of the book was September  
11 4th of 2011 -- 2012.

12 Are you aware of that?

13 A. You know, I'm not aware of the specific  
14 publication date.

15 Q. Was the discussion about the publication  
16 date one of the topics that were discussed in the  
17 telephone conferences that you had with the players  
18 or the characters you described earlier on August  
19 30th and August 31st?

20 A. It probably was. And I don't recall it,  
21 specifically.

22 Q. Do you recall whether or not the

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1 publication date was moved up from originally  
2 September 11th of 2012 to September 4th of 2012?

3 A. I don't. I don't.

4 Q. Did you give an opinion, one way or the  
5 other, about whether that was appropriate to move up  
6 the publication date?

7 MR. PATRIZIA: Object to form.

8 I'll permit the witness to answer.

9 A. You know, I don't recall expressing an  
10 opinion on that. As I said, very shortly thereafter  
11 in my first meeting with Mr. Johnson he made clear to  
12 me that from their perspective, notwithstanding  
13 what's in the letter -- from the department's  
14 perspective that issue was moot because  
15 prepublication copies of the book were in wide  
16 circulation at that point.

17 BY MR. FURMAN:

18 Q. Do you know what that meant, "wide  
19 circulation"? Do you know how many copies of the  
20 book were disseminated?

21 A. I don't know. I mean, my understanding  
22 was that review copies had been circulated, the

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1 department had obtained a copy. How many that was, I  
2 don't know.

3 You know, it came up in the context of  
4 asking the specific question: Was it too late, at  
5 this point, to now submit the book for prepublication  
6 review and to remedy the breach by going through the  
7 process, if you will, now.

8 And Mr. Johnson's response was, not only  
9 was it too late, but from the department's  
10 perspective, that would be idiotic because there was  
11 sufficient numbers of the book circulating at that  
12 point in prepublication circulation, if you will,  
13 that if the book were then submitted for  
14 prepublication review and the government were then to  
15 cut out all the bits that they thought were  
16 classified, thereafter all someone would have to do  
17 would be to hold copy A up against copy B and you  
18 could obviously identify everything the government  
19 regarded as classified.

20 Q. Do you know at that point whether or not  
21 the book in any form would have been published had it  
22 been submitted for a review?

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1 MR. PATRIZIA: Objection. Asked and  
2 answered.

3 I'll permit the witness to answer.

4 A. And the -- I can't answer the question  
5 hypothetically.

6 My understanding as of the first meeting  
7 with Mr. Johnson was that the government did not have  
8 an objection to a book about the subject matter, but  
9 it believed that specific things referenced in the  
10 book improperly disclosed training tactics, and  
11 procedures are classified information.

12 BY MR. FURMAN:

13 Q. When did that meeting with Mr. Johnson  
14 take place?

15 A. It would have been very early the  
16 following week.

17 Q. Would it have been before September 4th of  
18 2012?

19 A. You know, I'd have to look at a calendar  
20 at that point. I don't know, but it very likely  
21 would have been the Tuesday after labor -- if Monday  
22 was Labor Day, then it would have been the Tuesday.

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1 I mean, it was the next business day after I sent  
2 that letter.

3 MR. FURMAN: Why don't we take a short  
4 break? It will give me a chance to get some  
5 documents in order.

6 MR. PATRIZIA: Sure.  
7 (A break was taken.)  
8 (Exhibit Number 115 was marked for  
9 identification and was attached to the deposition.)

10 BY MR. FURMAN:

11 Q. Mr. Luskin, I've shown you what's been  
12 marked as Exhibit 115. It's a series of emails that  
13 are contained on documents LUS4512 and 4513. These  
14 are emails on August 31st of 2012.

15 I'm going to just ask you to turn your  
16 attention to the first page of this document and to  
17 an email at 7:40 a.m. from you to Elyse Cheney and  
18 Mark Fabiani.

19 It says: "Got them. Not the world's  
20 clearest copies, but legible mostly. I understand we  
21 are convening at 10:00."  
22

Is that the setup for a conference call

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1 with the various people that you were describing  
2 earlier?

3 A. I think it was, yes.

4 Q. And was this the first of the group or  
5 team conference calls regarding this matter?

6 A. You know, my recollection is that we spoke  
7 the evening -- that there were a bunch of folks on  
8 the call the evening before as well, that Mark  
9 reached out for me first one-on-one.

10 And then there was some sort of group  
11 conversation later that evening, the evening of the  
12 30th. So I think this was not the first.

13 Q. So just turning your attention to the  
14 first conversation -- I'd asked you about it earlier.  
15 I just want to make sure I close the loop on it.

16 Is it your recollection that Mr. Podlaski  
17 was a participant on that phone call in August -- on  
18 Thursday night, August 30th of 2012?

19 A. You know, as I look at these emails, it  
20 suggests to me that that's not the case and that I  
21 spoke with him the first time on August the 31st.

22 Q. And the reason I think that you're saying

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1 that is the email at 8:14 a.m. on August 31st of  
2 2012, an email to Elyse Cheney, Mr. Fabiani, Mr.  
3 Lehane, Mr. Ragone, and Mr. Bissonnette states: "I'd  
4 like to have a conversation with Kevin P. as soon as  
5 reasonably possible, please."

6 Do you see that?

7 A. Yes, I do.

8 Q. And now that you've read that, does that  
9 refresh your recollection, one way or the other,  
10 whether you spoke to Mr. Podlaski on Thursday, August  
11 30th of 2012?

12 A. You know, it doesn't really refresh my  
13 recollection, Mr. Furman. But as I read this, it  
14 certainly indicates to me that I did not speak with  
15 him on the 30th and spoke with him for the first time  
16 on the 31st.

17 Q. Now, when you spoke to him on the 31st,  
18 what do you recall that conversation being?

19 A. My recollection is that he generally gave  
20 me a briefing about how he had been retained, what he  
21 had done, what advice he had given, and his view of  
22 the situation and the legal merits of what was raised

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1 in Mr. Johnson's letter of August the 30th.

2 Q. And did you ask Mr. Podlaski whether or  
3 not he had seen a copy of the SCI nondisclosure  
4 agreement that was provided by Mr. Johnson in his  
5 August 30th letter prior to August 30th of 2012?

6 A. No. I don't recall that we had a specific  
7 conversation about when he had first seen it. And I  
8 don't recall asking him that and I don't recall him  
9 saying to me that he had or had not seen it.

10 Q. Now, there's an email at 9:22 a.m. on  
11 Friday, August 31st, again, to Elyse Cheney, Mr.  
12 Fabiani, Mr. Lehane, Mr. Ragone, and Mr. Owen -- Mr.  
13 Bissonnette, rather and it states that: "You had  
14 spoken to Mr. Podlaski and, quote, are on the same  
15 page, close quote."

16 Do you see that?

17 A. I do see that.

18 Q. In between 8:40 a.m. and 9:22 a.m., I'm  
19 presuming that you had that telephone conversation  
20 with Mr. Podlaski on Friday, August 31st of 2012?

21 A. Right, between 8:14 (sic) and 9:22. And  
22 my assumption is, right, that we had spoken in that

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1 intervening hour a little more.

2 Q. When you stated that you were, "on the

3 same page," what does that mean?

4 A. I think that I am referring generally to

5 what could be said in response to Mr. Johnson.

6 Q. Was -- was there a discussion with Mr.

7 Podlaski about whether or not to follow the

8 instruction by Mr. Johnson and take action to prevent

9 further dissemination of the book?

10 A. I don't recall having such a conversation

11 with him. I do recall that he was pretty adamant at

12 this point, that there was no legal requirement to

13 have submitted the book for prepublication review.

14 So the issue of whether to try and get the

15 publisher to withdraw the book was not the first

16 thing on our list of priorities.

17 Q. Now, do you recall the telephone

18 conference call that took place at 10:00 a.m.?

19 A. Only generally, only that we talked and I

20 thought probably talked more than once during that

21 day.

22 Q. Who was on that conference call?

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1 MR. PATRIZIA: The one at 10:00 a.m.?

2 MR. FURMAN: The one at 10:00 a.m.

3 A. You know, I don't recall specifically, but

4 assume that it would have been from among the group

5 to have included Mark Fabiani, Matt Bissonnette,

6 Elyse Cheney, Alex Gigante, and Kevin Podlaski.

7 BY MR. FURMAN:

8 Q. Who drafted the letter that's marked as

9 Exhibit 113, the August 31st, 2012 letter?

10 A. I did.

11 Q. Did you have anyone at the firm at Patton

12 Boggs work with you on this?

13 A. Not on this letter, no.

14 Q. Did you share a draft of this letter with

15 anyone before it was sent to Mr. Johnson?

16 A. I am almost certain that I shared a draft

17 with both the folks at the publisher and with Kevin

18 Podlaski.

19 Q. Do you recall whether or not the publisher

20 and/or Mr. Podlaski made any comments to the letter?

21 A. You know, I think folks did have some

22 comments, but I don't recall specifically what they

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1 were.

2 Q. Were there various drafts of this letter

3 before it was finalized?

4 A. Entirely possible.

5 Q. Do you have copies of the original drafts

6 of this letter?

7 A. I don't. This would have been done on my

8 home computer, not on an office system. So I would

9 have overwritten whatever first draft I wrote with

10 the comments that other folks provided. And so I

11 wouldn't have original versions of it.

12 My general recollection is that the final

13 draft is very close to the initial draft, that there

14 were not major modifications and that this thing did

15 not go through substantial changes. But I also

16 recall that there were at least some minor changes

17 that were made, but I don't specifically recall what

18 those were.

19 Q. What research was done in preparation for

20 this particular letter?

21 MR. PATRIZIA: Object to form.

22 I'll permit the witness to answer.

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1 A. Virtually none.

2 BY MR. FURMAN:

3 Q. Did you have access to associates or

4 anyone at the firm to assist in researching the

5 issues that were addressed in Jeh Johnson's letter?

6 A. I did not access any associate resources.

7 At that point in terms of the question of whether or

8 not prepublication review was required, I relied on

9 Mr. Podlaski.

10 Q. And was that 100 percent reliance? In

11 other words, you didn't undertake any separate

12 analysis of that issue?

13 A. Not at that time, no, I did not.

14 Q. Was there a reason why you didn't?

15 A. The reason was that I felt that it was

16 imperative that we prepare a response to Mr. Johnson

17 within 24 hours; that this was not so much a legal

18 memorandum as a way of making absolutely clear that

19 Mr. Bissonnette had acted in good faith; and that the

20 time would come when we would all have to drill down

21 further on the particular legal issues, but that

22 given Mr. Bissonnette's needs at this point, it was

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1 more important to get this letter out than to conduct  
2 further research or to refine the legal analysis.

3 Q. Did you consider whether or not to respond  
4 back to Mr. Johnson by asking for additional time and  
5 holding off on publication of the book until you  
6 could research the issues adequately?

7 MR. PATRIZIA: Object to form.  
8 I'll permit the witness to answer.

9 A. Ask for extra time about what?  
10 BY MR. FURMAN:

11 Q. Yeah. Well, that's fair. And I think I  
12 understand why Mr. Patrizia had an objection to the  
13 form, so I'm going to withdraw that question. Let me  
14 ask it a different way.

15 Did you consider advising your client to  
16 -- and also the publisher to stop further public  
17 dissemination of the book until you had adequate time  
18 to research the legal issues that were raised in Mr.  
19 Johnson's August 30th of 2012 letter?

20 MR. PATRIZIA: I'm going to continue to  
21 object to form. I'll also point out that this  
22 potentially touches on the privilege between Mr.

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1 Lusk and Mr. Bissonnette.

2 But I'll permit the witness to answer, so  
3 long as he does not discuss his specific advice to  
4 his --

5 MR. TOBEY: Just to append that, this  
6 would fall within the time period that I think the  
7 judge has ordered a general waiver of the privilege,  
8 August 30th of 2012 through September 4th of 2012.

9 She's ordered a general waiver of the  
10 privilege between Mr. Lusk and Mr. Bissonnette.

11 MR. PATRIZIA: You can agree to that  
12 waiver. My client can't. So as long as that  
13 instruction is clear, I'm fine.

14 MR. TOBEY: Okay.

15 A. Let me put it this way. I think the  
16 possibility of -- the question of whether or not to  
17 ask the publisher to do something about publication  
18 was on the table, but struck me as premature until  
19 there was further interaction with Mr. Johnson.

20 And so the primary task was to -- because  
21 Mr. Johnson had released this letter publicly and so,  
22 to some extent, had painted himself into a bit of a

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1 corner and created a great deal of public pressure on  
2 my client.

3 And it seemed to me that the primary goals  
4 were, first of all, to reassure him that Mr.  
5 Bissonnette had been acting in good faith; and  
6 secondarily, to do that in a way that was not  
7 dogmatic or challenging or adversarial and to invite  
8 specific engagement with him, which is why I said in  
9 the last paragraph, "If you have additional  
10 information that sheds a different light on these  
11 matters, we would be happy to discuss it with you,"  
12 holding open the possibility that they might have  
13 information that would alter our views on what the  
14 legal requirements were and that that information  
15 might affect a range of decisions to be made,  
16 including, but not limited to, the question of  
17 whether or when to publish the book.

18 BY MR. FURMAN:

19 Q. In the paragraph before that invitation,  
20 which is the third paragraph of your letter to Mr.  
21 Johnson, Exhibit 113 -- and I'll paraphrase it.

22 But you essentially are saying to Mr.

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1 Johnson that the 2007 SCI nondisclosure agreement  
2 would not apply to Operation Neptune Spear.

3 Is that essentially what you were telling  
4 Mr. Johnson?

5 A. What I was suggesting, which is, again,  
6 based on the advice I got from Mr. Podlaski, was that  
7 the special access programs that are covered under  
8 the SCI agreement, if I'm being clear here, are  
9 identified specifically operation by operation, which  
10 is what he told me.

11 And therefore, since the special access  
12 programs were identified in a memorandum that  
13 accompanied the SCI agreement in 2007, as a  
14 chronological matter, an operation that was conducted  
15 in 2011 couldn't have been covered, that that, if you  
16 will, was the argument Mr. Podlaski made to me, and  
17 which I then put in this letter. That's it.

18 Q. And did you make -- once you heard that  
19 argument and once you put it in writing, did you  
20 undertake any assessment of whether that's an  
21 accurate position to take?

22 A. The issue came up -- as I said, I met with

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1 Mr. Johnson and senior members of his staff very  
2 early the following week.

3 And that issue was presented squarely.

4 And at that point, subject to a promise of  
5 nondisclosure, they showed me the backup information  
6 that -- you know, if you look back at the 2007  
7 memorandum, there's an acronym.

8 I mean, there's a bunch of letters or  
9 notes that indicated that that was not a specific  
10 designation of an operation, but a generic  
11 description that pretty well encompassed all of the  
12 special operations programs that Mr. Bissonnette was  
13 engaged in.

14 So they essentially said this  
15 chronological argument you made misunderstands the  
16 way in which the programs are identified. Here is  
17 the backup information that makes that clear.

18 There may be arguments that we can make  
19 about the equities here, but this particular argument  
20 is not valid.

21 Q. And so I want to make sure I understand  
22 it. The acronyms that were in the 2007 nondisclosure

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1 agreement, one of them was broad enough to have  
2 included what was essentially the operation that  
3 culminated in Operation Neptune Spear?

4 A. Right.

5 MR. PATRIZIA: Object to the form.

6 I'll permit the witness to answer.

7 A. But that's a fair characterization of what  
8 they explained to me.

9 BY MR. FURMAN:

10 Q. And at any point in time before writing  
11 the August 31st, 2012 letter, did you go over with  
12 Mr. Bissonnette what those various acronyms stood for  
13 in the nondisclosure agreement in 2007?

14 MR. TOBEY: I'll object to the extent the  
15 question goes beyond September 4th of 2012 because  
16 that would be covered by the privilege.

17 A. But you're asking prior to the 31st?

18 BY MR. FURMAN:

19 Q. I am asking prior to the 31st.

20 A. And prior to the 31st, Mr. Bissonnette  
21 said, That's my signature on that SCI agreement; I  
22 don't remember signing it; I'm sure I did; I don't

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1 recall signing it.

2 And so the conversation about the  
3 substance of it and the acronyms, that's a  
4 conversation I had with Mr. Podlaski, not with Mr.  
5 Bissonnette. Mr. Bissonnette said he just didn't  
6 know.

7 Q. Did Mr. Podlaski tell you whether he knew,  
8 one way or the other, what those acronyms stood for?

9 A. What he told me was that the way -- based  
10 on his experience, the way that these SCI agreements  
11 worked was that these acronyms were quite specific  
12 and related to very specific operations.

13 And, therefore, whatever they meant, they  
14 could not have encompassed something that happened  
15 four years later.

16 Q. Now, before you ever heard of, "No Easy  
17 Day," had you ever reviewed or had an opportunity to  
18 review an SCI nondisclosure agreement?

19 A. I'd seen SCI nondisclosure agreements.  
20 That's correct.

21 Q. And the -- in the SCI nondisclosure  
22 agreements, they pertained to special access

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1 programs, correct?

2 A. That's correct.

3 Q. And the -- typically, SAPs or special  
4 access programs are identified by code words or  
5 letters, acronyms?

6 A. Yes.

7 Q. So one would have to know what the  
8 acronyms stand for in order to understand the  
9 parameters of the nondisclosure agreement.

10 Fair to say?

11 A. That's fair to say.

12 Q. And in representing -- in your initial  
13 representation of Mr. Bissonnette, did you undertake  
14 any independent efforts to appreciate what the  
15 acronyms were that were contained in the 2007 SCI  
16 nondisclosure agreement prior to writing the letter  
17 to Mr. Johnson on August 31st of 2012?

18 A. No.

19 Q. Is there any reason why you didn't?

20 A. Yes. I think I just told you, that I felt  
21 that it was important to get a response back within  
22 24 hours and I relied on Mr. Podlaski.

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1 Q. Was there anything that would have  
2 prevented you from having the conversation with Mr.  
3 Bissonnette to get that information before you wrote  
4 the letter on August 31st of 2012?

5 MR. PATRIZIA: Object to the form.

6 I'll permit the witness to answer.

7 A. As I told you, I asked him in this time  
8 frame about the agreement. And he said, That's my  
9 signature; I have no independent recollection of any  
10 of it; and I don't know what those things mean.

11 BY MR. FURMAN:

12 Q. So just so I understand your answer, you  
13 either asked him or he volunteered that he did not  
14 understand what those acronyms meant?

15 MR. PATRIZIA: And the "he" in that  
16 question is --

17 MR. FURMAN: The he is Mr. Bissonnette.

18 A. That's correct.

19 BY MR. FURMAN:

20 Q. Knowing that your client didn't know what  
21 those acronyms meant, and obviously you would not  
22 have known what they meant, were you comfortable with

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1 the position that was being taken in the August 31st,  
2 2012 letter that the 2007 SCI agreement did not apply  
3 to a 2011 operation?

4 A. I was comfortable enough about it to put  
5 it in the letter to indicate that -- in the context  
6 of the letter explaining that he had received legal  
7 advice, that there appeared to us to be a colorable  
8 basis for the book not to have been submitted for  
9 prepublication review.

10 And I was uncertain enough that I added  
11 the last sentence to the letter, which says: "If you  
12 have any additional information that sheds a  
13 different light on these matters, we would be happy  
14 to discuss it with you."

15 As I said, I was trying to strike a  
16 balance here between making clear to Mr. Johnson that  
17 that Mr. Bissonnette had been acting in good faith  
18 and not in defiance of his obligations, but also not  
19 wishing to be dogmatic or adversarial in the tone of  
20 the response and to invite a dialogue with DOD on  
21 this issue.

22 MR. FURMAN: I want to mark the next

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1 series of the email exhibits. They are also set  
2 around August 31st of 2012. That will be marked as  
3 Exhibit 116. And it's documents produced by Mr.  
4 Luskin. It's LUS4475 through 4480.

5 (Exhibit Number 116 was marked for  
6 identification and was attached to the deposition.)

7 BY MR. FURMAN:

8 Q. Now, Mr. Luskin -- thank you -- if you  
9 could look at the page which ends in 78. And these  
10 emails were -- you produced them to us, correct, from  
11 your --

12 MR. PATRIZIA: We produced them. The firm  
13 produced them on behalf of Mr. Luskin.

14 MR. FURMAN: Thank you.

15 BY MR. FURMAN:

16 Q. And these are emails that you were  
17 exchanging while at the Patton Boggs law firm?

18 A. That's correct.

19 Q. And I'm referring to the -- there's an  
20 email on the bottom of that page from you to a lawyer  
21 at Cahill named Dean Ringel.

22 Do you know why Mr. Ringel was involved in

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1 this matter?

2 A. You know, honestly, I have got absolutely  
3 no recollection of having dealt with somebody at  
4 Cahill.

5 Q. And that's why I had asked you earlier  
6 whether or not you recall Cahill being engaged to  
7 represent the publisher in connection with this  
8 matter.

9 And do you have a recollection, one way or  
10 the other, on that?

11 A. None whatsoever. I'm sorry.

12 Q. And in that email, you're attaching a  
13 draft of the letter to Mr. Johnson for comments and  
14 suggestions.

15 Do you recall that or see that, rather?

16 A. I do see that.

17 Q. Do you have a recollection doing that?

18 A. Pardon?

19 Q. Do you have a recollection of sending this  
20 draft to Mr. Ringel?

21 A. No. Sorry.

22 Q. And do you have any recollection -- I'm

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1 presuming an answer, but I need to ask it anyway.

2 Any recollection of Mr. Ringel responding

3 or commenting, one way or the other, on the draft?

4 A. No. As I indicated before, my general

5 recollection is that there were some very minor

6 changes that were suggested in the draft that I

7 circulated, but I don't recall by whom or what

8 specifically they were.

9 But as to what, if anything, Mr. Ringel

10 might have contributed, I can't help you. I'm sorry.

11 MR. PATRIZIA: Just for the record, I'll

12 also note that the timestamps are a little odd since

13 the initial email at the bottom of 4478 has a

14 timestamp of 145701 plus 0000.

15 Whereas, the reply from Mr. Ragone seems

16 to be at 11:49 a.m., which would have been

17 approximately three hours earlier if they were in the

18 same time zone. The timestamps are a little strange.

19 A. And the email -- well, timestamps are

20 always strange.

21 MR. FURMAN: And I think that the

22 timestamps -- and, Mr. Patrizia, thank you, for

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1 pointing that out, that what you stated is accurate.

2 The only issue is what time zones the various --

3 MR. PATRIZIA: Yeah, and I have no idea.

4 MR. FURMAN: -- the recipients were in.

5 A. And I was in the eastern time zone as

6 well. And so why the timestamp on mine is later than

7 the succeeding emails, I can't tell you.

8 My recollection is that I got up quite

9 early that morning and, you know, we had this call

10 that you showed me before, 9:30, 10:00.

11 And I had also spoken separately to Mr.

12 Podlaski and at that point immediately sat down and

13 banged out a draft within the next hour or so.

14 And so, you know, having these drafts

15 circulate before noon is consistent with my general

16 recollection of how quickly things moved.

17 BY MR. FURMAN:

18 Q. And the -- whether or not this is the next

19 sequence, it's not clear. But there's an email on

20 the 31st at 11:49 a.m. from Mr. Ragone to you, Mr.

21 Sevier at Penguin, another person at Penguin named

22 Christine Ball, Alex Gigante at Penguin, Mr.

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1 Bissonnette, Elyse Cheney, Mark Fabiani, Kevin

2 Maurer, who was the ghostwriter -- co writer, and Mr.

3 Ringel.

4 And the email says: "Mark F. and I are

5 okay with this."

6 The first question -- Mr. Podlaski doesn't

7 seem to be on this email. Is there a particular

8 reason why?

9 A. No. I don't know why. I mean, I know

10 that I shared my draft with Kevin, and I don't know

11 whether or not I did that separately as I appeared to

12 have done with Mr. Ringel and not on a group email.

13 And it may be -- and I'm speculating a bit

14 here, Mr. Furman.

15 Because these were all new to me, for some

16 of them it was easy to hit, "reply all" and attach a

17 draft. But I had gotten Mr. Podlaski's contact

18 information separately, so it wouldn't have been so

19 easy to have done so and so I would have sent it

20 separately.

21 Q. There was an email in response --

22 seemingly in response to Mr. Ragone with the same

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1 recipients on the email, excluding Mr. Podlaski.

2 He's not on this email.

3 And your question is: "Do we have a call

4 at noon?"

5 Do you see that?

6 A. Um-hum.

7 Q. Did the call take place?

8 A. I have no -- I don't recall.

9 Q. Now, the publisher through Mr. Sevier, who

10 was the Editor-in-chief at Penguin, sent an email

11 shortly after yours at 12 p.m. on August 31st, again,

12 to the same individuals. But it also included an

13 individual named Brian Tart, who I don't know who he

14 is.

15 And the email states that it's the

16 publisher's priority to get that strong letter out as

17 soon as possible.

18 Do you recall that being the publisher's

19 perspective?

20 A. I think this note sort of accurately

21 reflects what they were saying at the time.

22 Q. And Mr. Sevier mentions that he would

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1 participate in the call but has no further update  
2 except to execute the strategy agreed on this  
3 morning.  
4 Do you see that he discusses that?  
5 A. I see that, yes.  
6 Q. What strategy was agreed on that morning?  
7 A. Well, the strategy was, as I've been  
8 saying, to get this letter out as quickly as possible  
9 and then as soon as possible to engage face-to-face  
10 with senior leadership at DOD.  
11 Q. And do you know, one way or the other,  
12 whether Mr. Podlaski was part of the phone call and  
13 where that strategy was discussed and agreed?  
14 A. I don't.  
15 Q. On -- at 12:52 p.m. on that day -- and I'm  
16 turning your attention to page ending 77 -- your  
17 email to the same group states: "The letter is being  
18 faxed to Mr. Johnson now. A PDF copy is attached."  
19 So the letter effectively went out to Mr.  
20 Jeh Johnson on August 31st at roughly 1 p.m. on that  
21 day?  
22 A. Um-hum.

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1 Q. Now, turning your attention to the page  
2 ending in 76, Mr. Bissonnette on Friday afternoon at  
3 2:32 p.m. wrote to you individually. And he states:  
4 What's the next step once they get the letter?  
5 Thanks again, M."  
6 And you responded shortly thereafter at  
7 2:41 p.m. and stated: "I think for now we sit tight.  
8 They may respond with more information. They may  
9 stand pat. They may reach out for us. But as we  
10 discussed this morning, I don't think there's  
11 anything to be gained in the short run by talking  
12 with them since they're unlikely to say anything we  
13 want to hear."  
14 Do you see that?  
15 A. Um-hum.  
16 Q. And that's your advice to Mr. Bissonnette  
17 at that point, is to sit tight?  
18 A. It was, although it was very quickly  
19 overtaken.  
20 Q. Did you consider whether or not at that  
21 point in time to take further action to protect Mr.  
22 Bissonnette's interests by reviewing and analyzing

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1 independent of Mr. Podlaski the position that the  
2 2007 SCI nondisclosure agreement would have applied  
3 to Operation Neptune Spear?  
4 A. Well, to answer your question, I did  
5 immediately begin consideration of the general  
6 question of what remedies the government might have,  
7 including, but not limited to, the SCI agreement.  
8 And my particular immediate concern was  
9 not so much the SCI agreement, which gave the  
10 government a contractual remedy to seek forfeiture of  
11 proceeds, but an action by the government under the  
12 so-called SNEPP doctrine because my concern was that  
13 notwithstanding the fine points of the SCI agreement,  
14 it would be a relatively easy matter for the  
15 government simply to rely on the SCI agreement as  
16 proof that Mr. Bissonnette had a fiduciary  
17 relationship with the government and a generalized  
18 obligation to protect its confidences.  
19 And then regardless of whether or not the  
20 technical terms of the SCI agreement were met in the  
21 form of a special access program could proceed with  
22 an action for constructive trust under SNEPP and

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1 simply do an end run around the fine points of the  
2 SCI agreement.  
3 So in very short order -- and I can't tell  
4 you exactly what the date was -- I asked one of my  
5 partners to basically look in greater detail at  
6 whether or not there was potential liability for Mr.  
7 Bissonnette under a fiduciary constructive trust  
8 theory.  
9 I had a general understanding of the case  
10 and how it worked and the fact that the government  
11 had relied on it, but I wanted more detail.  
12 And so my first legal research priority  
13 really was in that direction because, in my view,  
14 that mooted the debate or could moot the debate about  
15 the fine points of the SCI agreement.  
16 Q. And there would have been a -- I think  
17 it's a partner in your firm at Patton Boggs who --  
18 A. It probably would have been Jamie Gardner,  
19 I think, that I called, but I'm not 100 percent  
20 certain.  
21 Q. Maybe if I can mark -- I only have two  
22 copies of the billing invoices that were provided.

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1 And my own apologies. It's too much for Izabell to  
2 carry. So I'll have one to mark and then one to  
3 share with you, Mr. Patrizia.  
4 And Robert, do you have a copy?  
5 MR. TOBEY: I do.  
6 (Exhibit Number 117 was marked for  
7 identification and was attached to the deposition.)  
8 MR. TOBEY: You've compiled both the  
9 Patton Boggs and Paul Hastings invoices?  
10 MR. FURMAN: Correct.  
11 MR. TOBEY: And that includes the last two  
12 that we supplied recently?  
13 MR. FURMAN: Correct. I think we're doing  
14 this all on the record, so let's make sure we talk  
15 one at a time. Frankly, I don't know how we received  
16 this. I have to ask Izabell for that.  
17 How did we get this, the document  
18 production or --  
19 MS. LEMKHEN: I believe it was a dropbox.  
20 MR. PATRIZIA: My understanding, subject  
21 to being corrected by Mr. Tobey, is that Mr. Tobey's  
22 firm produced an unredacted set of invoices.

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1 We had produced a set of redacted invoices  
2 because under California Law, which Paul Hastings as  
3 a California firm believes it's covered by, full sets  
4 of invoices with descriptions of services are covered  
5 by the privilege.  
6 So we could not as a firm waive that  
7 privilege and produce unredacted copies.  
8 My understanding, subject to Mr. Tobey's  
9 correction, is that Mr. Tobey produced a set which is  
10 unredacted. And I assume that's where these are  
11 drawn from.  
12 MR. TOBEY: We produced a set after the  
13 court ordered us to produce an unredacted set.  
14 Subsequently, you sent out some additional discovery  
15 requests and asked for any additional invoices.  
16 There were two. I want to say they were  
17 dated in September and October of this year which  
18 had, I think, the final billing for Mr. Lusk.   
19 MR. FURMAN: Okay. And the reason -- and  
20 I thank everyone for jumping in on that. I just want  
21 the record to be clear on how we have these invoices.  
22 And the order of these invoices are chronological.

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1 BY MR. FURMAN:  
2 Q. I'm certainly not going to be asking you  
3 questions about every entry; otherwise, we'll be here  
4 for several weeks and we'll miss the inauguration.  
5 A. Now, it's sounding better.  
6 MR. FURMAN: I had to throw that in.  
7 BY MR. FURMAN:  
8 Q. I want to turn your attention, if you  
9 will, to the invoice, which is dated October 10th of  
10 2012. It should be towards the top of Exhibit 116.  
11 A. Yes.  
12 Q. There's an acronym, JJD. Who is that?  
13 A. That would be Jack Deschauer,  
14 D-E-S-C-H-A-U-E-R, who was one of my partners and who  
15 had formally been the head of policy and planning in  
16 the defense department. He had been a senior  
17 official in the DOD.  
18 Q. And the acronym JSG, that refers to Mr.  
19 Gardner?  
20 A. Ms. Gardner, yes, Jamie Gardner,  
21 J-A-M-I-E, G-A-R-D-N-E-R.  
22 Q. Ms. Gardner, why was she involved in this

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1 matter?  
2 A. I asked Jamie to oversee the research into  
3 the SNEPP issues that I talked about earlier.  
4 Q. And there's an acronym for someone listed  
5 as DZA. Who is that?  
6 A. I think that that would be Zach Adams,  
7 Z-A-C-K, Adams, A-D-A-M-S.  
8 Q. Now, if you just flip through the invoice,  
9 you'll see that considerable time was spent  
10 researching the various issues that relate to the  
11 potential criminal charges, forfeiture remedies, and  
12 possible causes of action.  
13 Does that -- is that research that was  
14 related to assessing the issues that were first  
15 raised in Mr. Johnson's letter of August 30th, 2012?  
16 MR. PATRIZIA: Object to the form.  
17 I'll permit the witness to answer.  
18 A. It was really quite a bit broader than  
19 that because Mr. Johnson simply referred to the  
20 agreements. And as I said, I wanted further research  
21 on equitable remedies.  
22 And although one could infer from Mr.

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1 Johnson's letter that there was a potential risk of  
2 criminal prosecution, it didn't overtly threaten it.  
3 But, again, that was something that I wanted further  
4 research on.

5 And I should add the other person who  
6 worked on this file but did not bill his time was my  
7 partner, Michael Nardotti, N-A-R-D-O-T-T-I, who is  
8 the former Judge Advocate General of the Army. And  
9 General Nardotti simply declined to bill his time on  
10 this matter.

11 There may be odd billing entries here.  
12 But his view was as a -- he regarded anything that  
13 was in the aid of a SEAL with Mr. Bissonnette's  
14 record to be a pro bono obligation, and he wouldn't  
15 bill his time. But he's someone else whom I was  
16 consulting with in real time.

17 Q. Now, at the time that you had drafted and  
18 sent the August 31st letter, the position that is  
19 reflected in the third paragraph of your letter,  
20 which in substance states that the 2007 nondisclosure  
21 agreement should not apply to the 2011 Operation  
22 Neptune Spear, if I understand your testimony, you

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1 based that position upon Mr. Podlaski's advice to  
2 you?

3 A. That's correct.

4 Q. In the time period thereafter -- and I'm  
5 looking at the invoice, so I'm just going to  
6 calculate the hours that were spent.

7 Without doing the math, it clearly looks  
8 to be approximately 100 hours of work that was done  
9 by the firm. Was there an independent review of Mr.  
10 Podlaski's advice?

11 MR. PATRIZIA: Object to the form.

12 I'll permit the witness to answer.

13 A. As I said, very early on in my first or  
14 second interaction -- face-to-face interaction with  
15 DOD, they shared with me backup information that  
16 indicated that that argument was probably not a  
17 winner.

18 And so my focus turned to the question of  
19 both potential criminal liability and equitable  
20 remedies because, as I said, regardless of whether we  
21 could prevail on the relatively narrow technical  
22 question about the scope of the SCI agreement, if the

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1 government could successfully pursue an equitable  
2 remedy, it didn't matter; we still lost.

3 BY MR. FURMAN:

4 Q. So once you were apprised of the backup  
5 information from the Department of Defense, which  
6 explained why, in fact, the 2007 SCI nondisclosure  
7 agreement would apply to Operation Neptune Spear, did  
8 it occur to you then at that point that what Mr.  
9 Podlaski had advised to you was incorrect?

10 A. Yeah. It certainly seemed to me that that  
11 was possible.

12 Q. And did you discuss that with Mr.  
13 Bissonnette, that the advice that Mr. Podlaski had  
14 given you that formulated the position that was  
15 outlined in the August 31st of 2012 letter was  
16 incorrect?

17 MR. TOBEY: What time period are we  
18 talking about? Is this open-ended?

19 MR. FURMAN: No. I'm asking it based on  
20 the answer. The answer was that it -- well, let's  
21 have it read back. That's a lot easier for me to do  
22 that.

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1 MR. TOBEY: Because I have a privilege  
2 issue, obviously, after September the 4th of 2012.  
3 (The reporter read back the requested  
4 testimony.)

5 BY MR. FURMAN:

6 Q. So that I can understand the time frame,  
7 the meeting with Mr. Johnson would have been --

8 A. Early Labor Day week, I believe, Mr.  
9 Furman.

10 Q. And that would have been September 4th,  
11 the first business day after Labor Day?

12 A. Very possibly.

13 Q. So I'll restate the question. I think I  
14 can restate it.

15 Once you were apprised in that meeting  
16 very early in September, possibly September 4th, of  
17 the fact that there was backup information that tied  
18 the 2007 nondisclosure agreement to Operation Neptune  
19 Spear in 2011, did it occur to you that Mr.  
20 Podlaski's advice was incorrect?

21 MR. PATRIZIA: Objection. Asked and  
22 answered.

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1 I'll permit the witness to answer.

2 A. Yes, it did.

3 BY MR. FURMAN:

4 Q. And did you share that conclusion that Mr.

5 Podlaski's advice was incorrect to Mr. Bissonnette at

6 the time that you came to that conclusion?

7 MR. PATRIZIA: Objection as to privilege

8 if it's the period after September 4 when such a

9 conversation would have occurred.

10 MR. TOBEY: I would adopt the same

11 objection.

12 MR. FURMAN: Yeah. And I would add to

13 that that Justice Collins issued two rulings that

14 pertained to Mr. Lusk's deposition.

15 She -- let me find what she said. She

16 stated that she granted our motion to compel

17 information and documents from August 30th through

18 September 4th as it pertained to Mr. Lusk.

19 And then with respect to the statute of

20 limitations, she stated that we were permitted to

21 compel information relating to Mr. Bissonnette's --

22 or Mr. Lusk's knowledge of Podlaski's malpractice

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1 up and through December 31st of 2012.

2 MR. TOBEY: I think that's fair. I will

3 amend my objection to any discussion after December

4 31, 2012 on the subject of Mr. Furman's question.

5 MR. PATRIZIA: I think it's very important

6 that we proceed question by question in this area --

7 MR. TOBEY: Yes.

8 MR. PATRIZIA: -- because of the risk to

9 the privilege.

10 So if the question were whether between --

11 whether there was any such conversation prior to

12 September 4 and then a question as to the period

13 between September 4 and December 31 of 2012, I think

14 we can rely on the determination of the issue that's

15 in the Justice's order.

16 Post December 31, 2012, we're going to

17 have a different issue.

18 MR. FURMAN: I understand. And just so

19 that I can get this all straight -- I'm going to ask

20 a fresh question.

21 MR. PATRIZIA: No problem. I just want to

22 -- just so we're clear on what the time periods are.

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1 MR. FURMAN: I understand.

2 BY MR. FURMAN:

3 Q. And if I -- if I ask a question I already

4 asked, I apologize in advance. I'm just trying to

5 set the stage once again.

6 You met with Mr. Johnson, Jeh Johnson, of

7 the Department of Defense very early on -- it might

8 have been September 4th, on that day after Labor Day

9 -- to discuss the issue with Mr. Bissonnette,

10 correct?

11 A. That's correct.

12 Q. And at that meeting you were advised that,

13 in fact, there was information and documentation to

14 clearly indicate that the 2007 SCI nondisclosure

15 agreement related to the 2011 Operation Neptune

16 Spear, correct?

17 A. Well, to be clear, we had a couple of

18 meetings at the Defense (sic) in very short order.

19 And whether this was at the first or the second

20 meeting, I can't be sure.

21 But what I think I can say is, in

22 relatively short order, they had satisfied me that we

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1 probably did not have a winning argument that the SCI

2 agreement did not apply.

3 Q. And just so I get the timing down, your

4 meetings with Mr. Johnson would have taken place very

5 early in September.

6 Is that fair to say?

7 A. That's my recollection, yes, sir.

8 Q. And I can find them -- you would have --

9 sorry for staggering around here -- strike all of

10 that.

11 You would have billed for the time that

12 you spent with Mr. Johnson at the Department of

13 Defense, correct?

14 A. I would certainly try. I don't know --

15 Q. That's a fair answer that every lawyer

16 will give --

17 A. That's exactly right.

18 Q. -- especially if you have to report back

19 to your partners.

20 A. I am not very good about that. Let me put

21 it that way.

22 Q. So just give me a moment, if you don't

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1 mind. I want to pin those dates down. I think that  
2 they're important to make the record clear.

3 A. And this suggests, Mr. Furman, that the  
4 first meeting wasn't until September the 20th.  
5 That's inconsistent with my recollection, but I defer  
6 to my billing notes.

7 MR. PATRIZIA: The invoices speak for  
8 themselves, whether that was the first meeting or  
9 subsequent meeting --

10 A. That's the first meeting that's noted in  
11 the billing invoices.

12 BY MR. FURMAN:

13 Q. There is an entry by Mr. Deschauer -- Ms.  
14 Deschauer --

15 A. Mr. Deschauer.

16 Q. -- Mr. Deschauer on September 12th of  
17 2002, in which he spoke to Mr. Johnson at the  
18 Department of Defense or an intermediary for him  
19 regarding a potential meeting.

20 Do you see that?

21 A. Yes, I do.

22 Q. As you review these entries and with that

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1 particular entry in mind, is it fair to say that the  
2 first face-to-face meeting would have been on  
3 September 20th of 2012 with Jeh Johnson?

4 A. That's certainly what the billing entry  
5 suggests.

6 Q. And on the days preceding, Mr. Deschauer  
7 had made various phone calls to the Department of  
8 Defense to set up that meeting with Jeh Johnson for  
9 you?

10 A. That's right.

11 Q. Prior to that meeting, you had an email  
12 exchange with Professor Jack Goldsmith, correct?

13 A. That's correct.

14 Q. Now, Professor Goldsmith, among other  
15 things, is a professor at Harvard Law School, but  
16 also has a blog called Law Fare.

17 Are you aware of that?

18 A. Yes.

19 Q. And Law Fare is essentially an  
20 intelligence/national security blog that Mr.  
21 Goldsmith and one other person maintains.

22 Is that your understanding?

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1 A. You know, I don't follow it, but that's my  
2 general understanding.

3 Q. That was my next question, was whether you  
4 follow it.

5 A. No.

6 Q. Have you written on it or participated?

7 A. No.

8 Q. When did you first become aware that  
9 Professor Goldsmith had viewed -- taken a view about  
10 the issue raised by Mr. Johnson's August 30th of 2012  
11 letter?

12 A. You know, I think that after I wrote the  
13 August 31st letter that he reached out for me and  
14 asked for a copy of the Jeh Johnson letter. So he  
15 had a copy of my response but not the initial letter.

16 And I think that I shared that with him  
17 and then we either had email and/or telephone chats  
18 about it because he seemed to me someone whose brain  
19 I wanted to pick on these issues.

20 Q. Do you recall that at least initially  
21 Professor Goldsmith agreed with the position that was  
22 reflected in your August 31st, 2012 letter, which,

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1 among other things, suggested that the language in  
2 the SCI agreement was sufficiently vague, that it  
3 would not cover a prospective operation like  
4 Operation Neptune Spear four years after the signing  
5 of a nondisclosure agreement in 2007?

6 A. You know, what I recall is that he did  
7 write on the subject and said some encouraging things  
8 and some discouraging things.

9 Q. What were the discouraging things that you  
10 recall?

11 A. You know, my recollection is that he  
12 didn't take as strong a position as we would have  
13 liked. And I remember talking about this issue with  
14 Mr. Podlaski and have a general recollection of  
15 sharing Goldsmith's article with Mr. Podlaski and his  
16 feeling like that he was hoping for something  
17 stronger.

18 But that's -- it's just a very general  
19 recollection.

20 Q. And when you say he was looking (sic) for  
21 something stronger, are you referring to Mr.  
22 Podlaski?

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1 A. Yes.

2 MR. FURMAN: I'm going to show you and

3 have marked as an exhibit emails that were produced

4 that are designated LUS4440 through 4442.

5 And these are emails that are between

6 yourself, Mr. Luskin, and Mr. -- I'm sorry. Excuse

7 me -- Professor Goldsmith that relate to what we were

8 just discussing.

9 (Exhibit Number 118 was marked for

10 identification and was attached to the deposition.)

11 MR. PATRIZIA: Do you want to take a break

12 for a few minutes?

13 MR. FURMAN: Yes.

14 (A break was taken.)

15 BY MR. FURMAN:

16 Q. Mr. Luskin, I'm showing you what's been

17 marked as Exhibit 118. Do you recall this being the

18 time period, September 4th, that you were first in

19 contact with Mr. Goldsmith about the issue of Jeh

20 Johnson's letter?

21 A. That's right.

22 Q. Did you have a conversation with Mr.

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1 Goldsmith about it, other than an email exchange?

2 A. I do think we had at least one telephone

3 conversation. As I indicated to you, I very much

4 wanted to pick his brain given his background at OLC

5 and the Department of Justice.

6 Q. You had mentioned earlier that there were

7 parts of his view that you thought were good and

8 parts that were troubling. I'm not quoting you. I'm

9 just paraphrasing what I thought I heard you say.

10 Can you tell me what you thought was not

11 positive or troubling?

12 A. No. I can't, sitting here now. I recall

13 that after our conversations he wrote an entry for

14 his blog and my recollection is that some of it was

15 supportive and I think he said some negative things

16 about how opaque the language of the SCI agreements

17 were.

18 But again, my recollection is that he

19 didn't expressly support the view about the

20 chronological impossibility of the Neptune Spear

21 being a special access program governed by the SCI

22 agreement.

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1 And again, I have a general recollection

2 of sharing those conversations and the blog in real

3 time with Kevin and our both kind of sharing the view

4 that it would have been nice if he had been even more

5 supportive. But I'm giving you very much an

6 impressionistic recollection.

7 Q. I'm going to show you an email that is

8 consistent with what you just described. This will

9 be marked as Exhibit 119.

10 (Exhibit Number 119 was marked for

11 identification and was attached to the deposition.)

12 BY MR. FURMAN:

13 Q. Now, this is an email exchange that I

14 received or was produced, rather, through Mr.

15 Podlaski's firm. And it's designated by a Bates

16 number KP ending in 396 through 399.

17 MR. PATRIZIA: Mine ends at 400.

18 MR. FURMAN: It does end at 400. Thank

19 you.

20 BY MR. FURMAN:

21 Q. Mr. Luskin, do you recall the email

22 exchanges with Professor Goldsmith that are reflected

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1 in document 119?

2 A. Beyond what I've just told you, I have no

3 independent recollection of the exchange.

4 Q. Are these -- do these emails -- are they

5 essentially -- are these the emails that you received

6 that you mentioned earlier in your discussion about

7 Mr. Goldsmith's opinion about the issues related to

8 Mr. Johnson's letter?

9 A. This, as well as the fact that I think

10 that he published a blog entry as well. So in

11 addition to his email to me, I think he published

12 something for kind of wider circulation.

13 MR. FURMAN: This will be 120.

14 (Exhibit Number 120 was marked for

15 identification and was attached to the deposition.)

16 BY MR. FURMAN:

17 Q. Mr. Luskin, I'm showing you what has been

18 marked as Exhibit 120, which is I believe to be the

19 blog that you referred to. I just want to show it to

20 you and ask you if this is a printed version of that

21 very blog you've just described?

22 A. This certainly looks like it, Mr. Furman.

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1 Q. Now, the hardcopy that I showed you that's  
2 been marked as Exhibit 120, it is dated or has a date  
3 line of September 10th of 2012.

4 Is that consistent with your recollection  
5 as to the date of the blog?

6 A. It is generally consistent with the time  
7 frame, right.

8 Q. These pages are not marked. But if you  
9 flip to the third page towards the bottom, there is a  
10 sentence that starts off with, "who is right" and  
11 there's a reference that -- the language in the SCI  
12 has some ambiguity to it in the paragraph that  
13 follows.

14 Do you see that?

15 A. I do.

16 Q. Now, if I can turn your attention to the  
17 paragraph above that, it starts off with the  
18 sentence: "Now for the tricky legal question."

19 And Professor Goldsmith states, quote:  
20 "Is it possible that the 2007 SCI nondisclosure  
21 agreement that Bissonnette signed imposed  
22 nondisclosure and prepublication consultation

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1 obligations concerning not just the SCI in the  
2 special access programs he was read into in 2007, but  
3 in all subsequent SCI" -- "in all subsequent special  
4 access programs he was read into as well."

5 Do you see that?

6 A. Yes, I do.

7 Q. Now, was that the part of his opinion that  
8 you viewed was potentially troubling?

9 A. No. I think what was potentially  
10 troubling or at least not as supportive as one would  
11 have hoped was the discussion after, "who is right?"  
12 I mean, the paragraph you're referring to  
13 in a way kind of paraphrases the arguments that we  
14 made in the August 31st letter to Mr. Johnson. And I  
15 think Professor Goldsmith goes on after "who was  
16 right" to discuss his view about the matter.

17 And the other thing is that all of this  
18 was conditioned upon our view that it was possible  
19 that the Jeh Johnson letter was written somewhat  
20 hastily, if you will, in response to the fact that  
21 copies of the book were circulating and that DOJ  
22 (sic) might have -- DOD -- pardon me -- would have

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1 documents that it hadn't yet located or shared that  
2 would shed further light on this issue.

3 So I think both Professor Goldsmith and we  
4 were being somewhat tentative in expressing our views  
5 because of the possibility that we'd stake out a  
6 position that would then subsequently be contradicted  
7 by a document we had not yet seen.

8 Q. And that leads me to -- back to -- or  
9 forward to the September 20th meeting with Jeh  
10 Johnson. Now that we have an understanding of the  
11 date based on --

12 A. Billing records.

13 Q. -- the billing records, is that your  
14 recollection of the time in which you were then  
15 apprised that the acronyms that were in the 2007 SCI  
16 nondisclosure agreement encompassed the 2011  
17 Operation Neptune Spear?

18 A. That would have been the time. That's  
19 right.

20 Q. And was it at that point in time that you  
21 appreciated that the advice that you were given and  
22 that Mr. Bissonnette was given by Mr. Podlaski was

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1 incorrect?

2 A. You know, what I would say is that in the  
3 intervening two-week period we'd also been looking  
4 much harder at the SNEPP doctrine. And by that  
5 point, I was very pessimistic about our chances of  
6 winning an equitable action regardless of how the  
7 more narrow issue of the applicability of the SCI  
8 agreement turned out.

9 So I guess I would say that by the 20th of  
10 September I was feeling pretty negative about our  
11 ability, as a general matter, to prevail on the  
12 merits if the government brought a forfeiture action,  
13 not just because of concerns about whether we would  
14 prevail on the narrow SCI issue, but whether we could  
15 also successfully defend an equitable action.

16 Q. And what you've described as the equitable  
17 action that reflects, essentially, a problem with the  
18 SNEPP doctrine, correct?

19 A. That's correct.

20 Q. And when did you come to that view that  
21 you were going to have some issues, putting aside the  
22 contractual issues, but dealing with the SNEPP

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1 doctrine issue itself?

2 A. You know, I would say that I was worried  
3 about the SNEPP issue really almost from the  
4 beginning because it -- I was generally aware of the  
5 doctrine and how the government had used it and its  
6 potentially quite broad parameters and was very much  
7 worried that it could serve -- I hate to use this  
8 word -- as a trump card. I'll try not to say that as  
9 a proper name anymore -- to essentially moot the  
10 dispute over the SCI issue.

11 And that's why I started looking at the  
12 issue myself and then very quickly asked others to  
13 start looking at it as well because, you know -- I  
14 guess I would say by the end of the week of the 20th  
15 I was of the view that it sort of didn't matter, you  
16 know, how we came out on the SCI issue because we  
17 were sunk on the SNEPP issue.

18 Q. So at that time period that you just  
19 described around September the 20th and shortly  
20 thereafter, did you also reach the conclusion that  
21 Mr. Podlaski's advice was incorrect because it did  
22 not account for the SNEPP doctrine?

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1 A. Well, you know, I don't think I was  
2 thinking about it in terms of whether Mr. Podlaski  
3 was right or wrong. I was thinking about it in terms  
4 of whether or not we could win a threatened lawsuit.

5 And so I guess from my frame of reference  
6 by, you know, the week of September the 20th, I  
7 thought that we would probably lose such a lawsuit.

8 Q. So at that point in time did you in any  
9 form, whether it's in writing or via phone call,  
10 advise Jeh Johnson that the position that was adopted  
11 on September -- sorry -- on August 31st in your  
12 responsive letter was retracted or now mooted?

13 A. No. I think we moved very quickly from  
14 arguing about the merits to arguing -- to talking  
15 about a path forward.

16 And it seemed to me by that point not in  
17 Mr. Bissonnette's interest to be taking a very  
18 adversarial approach to the DOD, not simply because  
19 of the merits of a potential civil suit, but also  
20 because of the attendant risk that such a continuing  
21 public dispute would raise the likelihood that Mr.  
22 Bissonnette might be prosecuted.

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1 And so Mr. Johnson and I very quickly  
2 started a dialogue about what would be a fair  
3 resolution of the government's potential claims.

4 Q. And you were -- just so I understand this,  
5 you were now starting to turn your attention toward  
6 resolving these issues both on the criminal side and  
7 also the civil side because you had come to a landing  
8 (sic) on the fact that the government was essentially  
9 going to win?

10 A. I thought -- let me put it another way.

11 I thought the best path forward was  
12 talking about a constructive resolution rather than  
13 taking an adversarial approach, that that was in Mr.  
14 Bissonnette's overall best interest both in terms of  
15 where we came out, in terms of a resolution of  
16 potential civil claims, but also in terms of what it  
17 -- what it entailed for a potential criminal  
18 investigation and prosecution.

19 To my knowledge, as of the end of  
20 September, DOD had not made a referral to the  
21 Department of Justice. And Mr. Johnson told me that  
22 explicitly.

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1 And although it is improper for a lawyer  
2 to threaten or not threaten a criminal prosecution to  
3 reach a civil resolution, he made it very clear to me  
4 that reaching such a resolution would increase the  
5 likelihood that there was no criminal investigation.

6 Q. So -- and I understand the ethics involved  
7 in that. Obviously, we all do.

8 But it was essentially an implicit message  
9 that Mr. Johnson was advising you that resolving the  
10 forfeiture matter amicably would essentially diffuse  
11 any more tension that could potentially lead to a  
12 criminal prosecution.

13 Is that what you're telling me?

14 A. I think that's a fair characterization.

15 Q. And you mentioned that taking an  
16 adversarial position was against Mr. Bissonnette's  
17 interests.

18 What do you mean by an adversarial  
19 position?

20 A. I mean essentially saying to the  
21 government, see you in court; we think your position  
22 stinks; and we think we have the right to publish the

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1 book without republication review; and if you feel  
2 otherwise, try and persuade a judge.

3 Q. Is it fair to say that once you had a  
4 chance to review the SNEPP doctrine and had the  
5 opportunity to review the documents that were  
6 produced by Mr. Johnson in that September 20th, 2012  
7 meeting that you concluded that Mr. Bissonnette  
8 should have submitted the book for prepublication  
9 review?

10 A. I think it was clear to me that the --  
11 that if we litigated that issue the government would  
12 have the better of the argument, yeah.

13 Q. Did you advise your client of that?

14 MR. PATRIZIA: At that time?

15 MR. FURMAN: At that time.

16 MR. PATRIZIA: So we're between September  
17 4 and December 31?

18 MR. FURMAN: Yeah.

19 BY MR. FURMAN:

20 Q. We are. But once you -- just so I get the  
21 -- yeah. Let's just make this general assumption.  
22 I'm only going to be asking about up and through

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1 December 31st. There's no way that I'm going to go  
2 past that.

3 MR. PATRIZIA: That's fine.

4 MR. FURMAN: Could I have the last  
5 question and answer read back, Sherry?

6 (The reporter read back the requested  
7 testimony.)

8 BY MR. FURMAN:

9 Q. And just so I get the time frame down  
10 clearly, the SNEPP doctrine reviewed by you and your  
11 firm was conducted in September of 2012 prior to the  
12 meeting with Mr. Johnson, correct?

13 A. That's right.

14 Q. And it was at the September 20th meeting  
15 that you actually saw the backup documents which  
16 connected the 2007 SCI nondisclosure agreement to  
17 Operation Neptune Spear?

18 A. That's right.

19 Q. So by September 20th, 2012, it was clear  
20 to you, as you described it, that if this matter was  
21 contested Mr. Bissonnette would have lost?

22 MR. PATRIZIA: Object to the form.

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1 I'll permit the witness to answer.

2 MR. TOBEY: Object to the form.

3 A. I did not -- let me put it this way: I  
4 did not think that on the merits of a suit that we  
5 would have a very strong argument and I thought the  
6 government would.

7 And I certainly had reached that  
8 conclusion by the end of the week of the 20th.

9 BY MR. FURMAN:

10 Q. And did you share that opinion with Mr.  
11 Bissonnette?

12 MR. PATRIZIA: At that time?

13 MR. FURMAN: At that time.

14 A. Yes.

15 BY MR. FURMAN:

16 Q. And what did you tell him?

17 A. We simply talked about the relative merits  
18 of the government's position. My concern as his  
19 lawyer was to give him the best advice I could  
20 possibly give him about the appropriate strategy  
21 going forward.

22 And certainly in the context of talking

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1 with him about moving towards a path of resolution,  
2 which, after all, is his choice, not mine, I  
3 certainly would have and did share with him my view  
4 of the merits of an alternate path of, you know,  
5 adversarial legal conflict.

6 I mean, he had a choice to make and, of  
7 course, I gave him my advice about the merits of each  
8 of those choices.

9 Q. Was Mr. Podlaski invited to the September  
10 20th meeting with Jeh Johnson?

11 A. No.

12 Q. Why wasn't he invited?

13 A. Because -- for a couple of reasons.

14 My view, you know, starting very, very  
15 early on was that Kevin was a potential witness in a  
16 criminal action or a civil suit because at the heart  
17 of either a civil suit or especially a criminal  
18 action, Matt Bissonnette's good faith would be a  
19 critical issue.

20 And the fact that Matt sought and received  
21 and followed legal advice in good faith seemed to me  
22 to be absolutely critical to any potential defense.

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1 And to that extent, Kevin was an important potential  
2 witness.

3 And in that context -- and again, putting  
4 that in the specific context of the meeting with Jeh  
5 Johnson, what seemed to me to be relevant to that  
6 meeting was the fact that Matt had sought and  
7 received and followed legal advice and that I wanted  
8 the meeting to focus on what we were going to do  
9 next, and not have it focus on the question of  
10 whether or not Kevin's advice was right or wrong  
11 because at that point that seemed to me to be  
12 completely irrelevant.

13 I mean, you know, the book had circulated.  
14 It was too late, according to the government, to  
15 submit it for prepublication review. The question  
16 was, was that advice correct or incorrect?

17 We crossed that bridge. And the really  
18 important issue was that Matt was a layperson who  
19 went out and hired someone with the credentials to  
20 give him the right advice on that subject.

21 And he listened to that advice and he'd  
22 followed it. And that was our mantra.



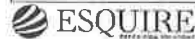
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1 And, you know, having Kevin in that  
2 meeting not only might have affected his viability as  
3 a potential witness in some subsequent proceeding  
4 because if he said anything then, somebody else might  
5 then be called to impeach him, but also it put the  
6 focus, from my perspective, on the wrong thing, which  
7 would be what happened historically when I wanted the  
8 focus to be on, what are we going to do now?

9 Q. So going into the September 20th meeting,  
10 if I understand you correctly, the mantra or the  
11 strategy among other things, would have been to  
12 express to Jeh Johnson and the Department of Defense  
13 that Mr. Bissonnette was acting in good faith and in  
14 reliance of advice of his lawyer in his decision not  
15 to submit the book for a prepublication review?

16 A. That's correct.

17 Q. At that point in time once that decision  
18 was made that Kevin Podlaski was significant as a  
19 witness, did you tell Mr. Podlaski at that point that  
20 that was the strategy that you were going to employ  
21 in responding to Jeh Johnson and the Department of  
22 Defense's threats of litigation?



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1 A. You know, throughout that period of time  
2 we were talking generally about these matters.

3 But the specific question of whether Kevin  
4 would attend that meeting simply didn't come up  
5 because, in my view, we were -- we both represented  
6 Mr. Bissonnette but that my specific role was in  
7 contending with a potential action by DOD or DOJ.

8 And Kevin's role was, if you will, as a  
9 consulting expert on issues related to prepublication  
10 review requirements. So I didn't need to put him in  
11 front of DOD. And we never discussed that.

12 But we were generally talking about the  
13 defense of the case. And it was -- you know,  
14 relatively in this period of time, I think when Kevin  
15 said, well, you know, we talked.

16 And one of the things, obviously, on our  
17 minds was the fact that the government's approach to  
18 some of these prepublication review cases had been,  
19 in a word, inconsistent and that there are other  
20 folks, including other Special Forces folks, who had  
21 published books without submitting them for  
22 prepublication review.



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1 And so at some point he volunteered to put  
2 together a list of books that he knew about that  
3 didn't -- that hadn't been submitted for review. And  
4 he came up with the idea of a FOIA request.

5 So we were talking about these issues, but  
6 the question of whether he would attend that meeting  
7 was never raised.

8 Q. But the idea of, among other things, the  
9 defense of Mr. Bissonnette to be centered on the fact  
10 that he received in good faith legal advice from Mr.  
11 Podlaski, did you tell Mr. Podlaski that that was  
12 going to be, among other things, the defense to the  
13 Department of Defense?

14 A. I'm sure we talked about that.

15 Q. And the fact that he was at that point  
16 potentially a witness, at the very least, did you  
17 discuss that with Mr. Podlaski, that he would be a  
18 witness in support of that defense for Mr.  
19 Bissonnette?

20 A. You know, I don't recall having that  
21 conversation because relatively early on we started  
22 talking about potential settlements, so I didn't see



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1 litigation as a viable option.

2 Q. In any case, but especially so in this  
3 particular case, would it have been important for you  
4 to identify and lock in certain witnesses that would  
5 support your client's defense?

6 A. Not necessarily, no. You know, for my  
7 experience as both a prosecutor and a defense lawyer,  
8 there are certain witnesses whom you do need to lock  
9 in either by a deposition or putting them in a grand  
10 jury and others with whom you have a sufficiently  
11 constructive and trusting relationship that you  
12 expect they'll be there when you need them.

13 And you not only don't need to lock them  
14 in, there are always pitfalls to having somebody's  
15 recorded testimony in the grand jury or deposition  
16 because that is always fodder for cross-examination.

17 And so the smarter thing to do in those  
18 circumstances is not to lock them in.

19 Q. You mentioned before that one of the  
20 various reasons why it would not have been sensible  
21 to bring Mr. Podlaski to the meeting is that the  
22 potential that he could then be cross examined on



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1 inconsistent statements.

2 I'm paraphrasing your -- what you --

3 A. That's a fair -- two reasons. One of the  
4 reasons was, I didn't want the meeting to be about  
5 the advice. I wanted it to be about Matt's good  
6 faith and how we were going to deal with the problem  
7 that we had.

8 And the other was that there was no upside  
9 in having Mr. Podlaski in a meeting because if he  
10 recalled something and got a date wrong, for example,  
11 if he were ever needed as a witness in the future,  
12 someone might impeach him with that.

13 Q. Did you give Mr. Podlaski any instructions  
14 about responding to any potential inquiries either  
15 from the press or from the Department of Defense or  
16 otherwise about his representation of Mr.  
17 Bissonnette?

18 A. No.

19 Q. Did you ever instruct Mr. Podlaski to not  
20 talk to Mr. Bissonnette without your involvement?

21 A. Very early on I think I said to Mr.  
22 Podlaski that I did not want him to talk about any of



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1 the historical facts if I wasn't also involved, and  
2 that's for two reasons.

3 One is if such a conversation took place,  
4 I wanted to hear it first from Mr. Bissonnette; and  
5 second, because in my mind, there was at least the  
6 possibility that on this issue of good faith Mr.  
7 Podlaski would be a witness.

8 I didn't want him to have conversations  
9 with Mr. Bissonnette that might subsequently taint  
10 either one of their potential testimony. You don't  
11 allow witnesses to talk -- potential witnesses to  
12 talk to each other.

13 And so for that reason, I basically said,  
14 unless I'm involved, I don't want you talking about,  
15 you know, historical facts with Matt.

16 Q. And what was -- how did you deliver that  
17 instruction? Was it by an email or a conversation  
18 with Mr. Podlaski?

19 A. You know, I don't recall.

20 Q. Well, you have a distinct recollection of  
21 having given that instruction to Mr. Podlaski?

22 A. Yes, I do.



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1 Q. And that would have been early on in your  
2 representation of Mr. Bissonnette?

3 A. That's right.

4 Q. Would it have been before or after the  
5 first Jeh Johnson meeting?

6 A. Couldn't tell you.

7 Q. Are you aware after your initial  
8 involvement whether or not Mr. Podlaski spoke to Mr.  
9 Bissonnette without your presence or involvement?

10 A. I didn't have a problem with them talking.  
11 I didn't want them talking about the facts.

12 Q. And my question was different, though. I  
13 appreciate your response.

14 Do you know whether or not they had any  
15 conversations about anything after your admonition to  
16 Mr. Podlaski that you described early on in your  
17 representation?

18 A. I do not know.

19 Q. Did Mr. Bissonnette tell you about any  
20 conversations he had with Mr. Podlaski outside of  
21 your presence after you gave that admonition early in  
22 your representation of Mr. Bissonnette?



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1 A. I don't recall any such conversations.

2 Q. Now, you mentioned that Mr. Podlaski had

3 -- I say sort of because I wasn't clear on

4 understanding what you said -- a consulting role in

5 connection with this matter?

6 MR. PATRIZIA: Object to the form.

7 I'll permit the witness to answer.

8 BY MR. FURMAN:

9 Q. And if I misstated what you said, it's my

10 own failing.

11 What role, if any, did Mr. Podlaski have

12 after you began your representation of Mr.

13 Bissonnette?

14 A. Well, I looked -- first of all, in the

15 early stages, I certainly looked to him for his views

16 on the potential legal claims that the government

17 might make and his advice on those issues.

18 And I recall before going to see Mr.

19 Johnson that I wanted -- you know, I asked him to

20 kind of restate it, if you will, in writing.

21 And it wasn't to lock him in, but I wanted

22 to make sure I really understood what his thinking

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1 was so that I didn't screw it up in sharing it with

2 folks at the DOD.

3 And I generally consulted with him during

4 that period of time about the path forward. As I

5 said, it was Kevin's idea to file the FOIA action.

6 You know, that had nothing to do with the initial

7 advice that he had given to Matt and it had nothing

8 to do with the scope of the SCI agreement.

9 These were kind of his ideas and thoughts

10 about what we could do to address the problem that

11 was facing Matt.

12 Q. Did --

13 A. So I relied on him as a resource.

14 Q. Other than what you described in terms of

15 the FOIA request, are you aware of anything else that

16 Mr. Podlaski did in connection with this matter after

17 September 4th of 2012?

18 A. Well, we certainly talked about the

19 Goldsmith interactions. And as I said, you know, for

20 a substantial period of time, I was keeping him very

21 closely apprised of what was going on.

22 I would say after those initial meetings

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1 at DOD less so.

2 Q. And that initial meeting was September

3 20th of 2012. So using that as a benchmark, after

4 that and putting aside the FOIA request, could you

5 tell me anything that Mr. Podlaski did in connection

6 with this matter?

7 A. I can't think of anything concrete, no.

8 Q. Do you know whether your client asked Mr.

9 Podlaski to do anything on his behalf after September

10 20th of 2012?

11 A. I don't know.

12 Q. Was it Mr. Podlaski's idea to make the

13 FOIA request?

14 A. Yes, it was.

15 Q. Did you ask him to make the FOIA request?

16 A. Well, I did in the sense that I said: "

17 Yes, go ahead with that. That's a good idea."

18 Q. Did Mr. Bissonnette ask Mr. Podlaski to

19 make that FOIA request or was it you?

20 A. It was almost certainly me.

21 MR. FURMAN: Why don't we take a break for

22 lunch? It's 12:30.

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1 MR. PATRIZIA: That's fine.

2 (Whereupon, at 12:30 p.m., a

3 luncheon recess was taken.)

4

5 A F T E R N O O N S E S S I O N

6 (1:07 p.m.)

7 Whereupon,

8 ROBERT D. LUSKIN

9 was called for continued examination, and having been

10 previously duly sworn was examined and testified

11 further as follows:

12 EXAMINATION BY COUNSEL FOR DEFENDANTS

13 CONTINUED

14 BY MR. FURMAN:

15 Q. Mr. Lusk, I want to just turn back to

16 the September 20th, 2012 meeting with Jeh Johnson.

17 Did you brief Mr. Bissonnette about what

18 took place at the meeting?

19 A. I don't have a specific recollection of

20 having done so, but I'm quite sure I did.

21 Q. Did you share with Mr. Bissonnette at that

22 time your view about the likelihood of success in

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1 dealing with the government based on the -- your  
2 review of the SNEPP doctrine?  
3 A. Probably either then or before.  
4 Q. And did you share with Mr. Bissonnette  
5 after the September 20th, 2012 meeting what you  
6 learned in connection with the additional documents  
7 that tied the acronym in the 2007 SCI nondisclosure  
8 agreement that Mr. Bissonnette signed to Operation  
9 Neptune Spear?  
10 A. Probably in some form. Whether I  
11 specifically talked about the documents or simply  
12 said, you know, I think the government is going to  
13 have the better of that argument, I almost certainly  
14 shared the kind of general conclusions.  
15 Q. Did you share with him that information  
16 and those conclusions contemporaneously shortly after  
17 the September 20th of 2012 meeting?  
18 A. Almost certainly. As I think I said  
19 before, during that period of time, we were  
20 consulting regularly. And certainly one of the  
21 things I was talking to him about were our potential  
22 options and the best strategy.

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1 And in connection with those larger  
2 questions, the subsidiary question of how likely a  
3 legal defense on the merits would be to a civil suit  
4 was certainly part of that analysis.  
5 Q. Did you discuss with the government during  
6 that meeting on September 20th of 2012 the issue of  
7 segregating Mr. Bissonnette's royalties into a  
8 specific account?  
9 A. I did.  
10 Q. And what do you recall about that  
11 discussion?  
12 A. Well, what I told them was that while we  
13 discussed this matter further as an indicia of good  
14 faith, first, that Mr. Bissonnette wouldn't promote  
15 the book, wouldn't go on a book tour, wouldn't do any  
16 more interviews like the 60 Minutes piece that had  
17 been done, I guess, the end of August, and that  
18 second that he would not disperse any proceeds.  
19 So if there subsequently was either a  
20 contested action or a settlement, he would not be  
21 taking the position. You know, he no longer was in a  
22 position to satisfy any potential judgment or

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1 settlement.  
2 And those offers were intended to make it  
3 more likely that the government would not feel the  
4 need precipitously to file suit and seek injunctive  
5 relief while we had further discussions.  
6 Q. Was it then decided that the funds would  
7 be segregated in such a way that the government could  
8 have some oversight over that?  
9 A. No. They never had any particular  
10 oversight. We just simply made a representation that  
11 he would keep the funds in a discreet account and  
12 with the exception of attorney's fees he would not  
13 disperse them. But it was nothing more formal than  
14 that.  
15 Q. And was Mr. Bissonnette aware because of  
16 this agreement that you had reached with the  
17 government that he could not access those funds, that  
18 they were at least potentially subject to forfeiture  
19 to the government?  
20 MR. TOBEY: Object to form.  
21 A. Well, I think he understood that, for  
22 example, he wasn't going to give a portion to his

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1 wife, which he assumed -- or then ex-wife, which he  
2 had agreed to do.  
3 He wasn't going to make any donations to  
4 charity. He did make tax payments from them and  
5 continued to do so during the period of time while we  
6 were discussing these issues. And there were a  
7 couple of other discreet payments that he made that  
8 we had talked about.  
9 At that point, he was paying for extra  
10 security for his family because his identity had been  
11 outed, but he understood that the corpus was to stay  
12 intact.  
13 BY MR. FURMAN:  
14 Q. And just to follow up on that, he  
15 understood that the corpus wasn't -- sorry -- strike  
16 that.  
17 Mr. Bissonnette understood from that point  
18 forward, after your September 20th, 2012 meeting,  
19 that he wasn't to touch the corpus of the royalties,  
20 other than to pay for taxes and attorney's fees and  
21 security issues?  
22 A. That's correct. But it was never a

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1 binding legal agreement with the government. It was  
2 simply an offer that we made in good faith and -- I  
3 mean, if we had changed that position, I would have  
4 so informed the government. I would have felt  
5 obligated to do that.

6 But it was never reduced to writing. It  
7 was not a formal agreement of any kind. The  
8 government had no oversight over the funds.

9 Q. Before you made that offer to the  
10 government for the September 20th, 2012 meeting, did  
11 you discuss it with Mr. Bissonnette so he was on  
12 board with that?

13 A. Yes.

14 Q. And did you discuss that with Mr. Podlaski  
15 in any way?

16 A. I don't recall having done so.

17 Q. Just turning to the FOIA request that you  
18 had mentioned earlier, are you familiar with the FOIA  
19 request?

20 A. Generally speaking, yeah.

21 Q. Could anyone in the public make a FOIA  
22 request; in other words, you don't have to be a

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1 lawyer to do that?

2 A. That's correct.

3 MR. FURMAN: Let me mark that. I'm going  
4 to mark as Exhibit Number 121 an email. The Bates  
5 number just seems very strange to me because -- no.  
6 I'm sorry. It's not strange at all.

7 It's just cut off a bit. It's LUS3054 and  
8 3055.

9 (Exhibit Number 121 was marked for  
10 identification and was attached to the deposition.)

11 BY MR. FURMAN:

12 Q. Mr. Lusk, I'm showing you what's been  
13 marked as Exhibit 121.

14 Before the break, you had mentioned that  
15 you had contacted Mr. Podlaski to ask him the process  
16 that he undertook prior to your involvement.

17 Do you see that email?

18 A. I do.

19 Q. What prompted -- first of all, what  
20 prompted you to send that email? It's dated  
21 September 20th at 3:20 p.m.

22 And it states: "Talking to Jeh Johnson

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1 later today and want to make sure I understand the  
2 process so I don't screw anything up."

3 A. I think it was precipitated exactly as I  
4 said it.

5 Q. Oh, okay. In other words it, speaks for  
6 itself?

7 A. It speaks for itself.

8 Q. Okay. And there was an email that  
9 preceded that at 2:33 p.m. And you wrote: "Kevin, I  
10 want to be sure I understand how you reached your  
11 judgment that Matt did not have to submit his  
12 manuscript for prepublication review.

13 "Did you have access to any of Matt's  
14 signed agreements (either the ones that DOD sent us  
15 or others) or were you relying on his recollection of  
16 what he may have executed?"

17 Do you see that?

18 A. I do.

19 Q. What prompted you to ask that question?

20 A. I think it was the same set of concerns.  
21 I simply -- I simply wanted to know what the factual  
22 landscape was, and I wanted also to know and I think

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1 contemporaneously ask Kevin for his legal analysis so  
2 that when I spoke to Mr. Johnson I understood the  
3 landscape both factually and in terms of the advice  
4 that he was given.

5 Q. Now, I know we had asked questions before  
6 about September -- I'm sorry. Forgive me -- about  
7 the August 31st letter.

8 But at that point in time on August 31st  
9 of 2012, would you have had access to Mr.  
10 Bissonnette's signed agreements?

11 A. No. At that point, I did not.

12 Q. Did you ask for them?

13 A. In the context of the meeting with DOD, I  
14 asked whether or not this was all -- these were all  
15 the agreements that they had.

16 And they basically said subject to other  
17 things that were signed in connection with his  
18 discharge papers, these were the only applicable  
19 agreements.

20 Q. And after Mr. Podlaski had responded and  
21 he responded that same day to you at 4:09 p.m., did  
22 you do anything further after receiving Mr.

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1 Podlaski's response, at least in terms of Mr.  
2 Podlaski?  
3 A. You know, I simply don't recall whether we  
4 also spoke by phone.  
5 Q. Did your meeting with Mr. Johnson take  
6 place before or after this email exchange with Mr.  
7 Podlaski?  
8 A. I can't tell you.  
9 Q. Would it have been memorable to you or odd  
10 in any particular way that you would have had a  
11 meeting with Mr. Johnson after 4:00 p.m. on September  
12 20th?  
13 A. No. I don't think that would be unusual.  
14 I mean, people meet at all hours here.  
15 Q. Okay. And so if the meeting was, say,  
16 5:00 or 6:00 p.m., that would not have been in any  
17 particular way memorable or odd?  
18 A. No, it would not.  
19 Q. Okay. Do you recall, one way or the  
20 other, if the meeting took place before or after your  
21 receipt of this email at 4:09 p.m.?  
22 MR. PATRIZIA: Objection. Asked and

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1 answered.  
2 I'll permit the witness to answer.  
3 A. Yes. I've got no present recollection of  
4 that.  
5 BY MR. FURMAN:  
6 Q. After the September 20th meeting with Jeh  
7 Johnson, what was the next legal action, if any, that  
8 you undertook to represent Mr. Bissonnette's  
9 interests?  
10 MR. PATRIZIA: Objection to form.  
11 I'll permit the witness to answer.  
12 A. There were continuing discussions with DOD  
13 in the days and weeks following the September 20th  
14 meeting.  
15 BY MR. FURMAN:  
16 Q. And in what form did they take place?  
17 Were they phone calls, meetings, or --  
18 A. They were meetings at the Department of  
19 Defense. Mr. Johnson and I shared cell phone  
20 numbers, and I know we spoke directly by cell phone  
21 on a number of occasions.  
22 His principal deputy, a gentleman by the

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1 name of Robert Easton, E-A-S-T-O-N, also had a  
2 primary role here. And I spoke with him on a number  
3 of occasions.  
4 Q. Were there discussions about resolving the  
5 civil side of the matter?  
6 A. Yes. I mean, we very quickly turned to  
7 the question of whether or not there was a common  
8 ground that we could find to resolve the civil case.  
9 Q. And was the resolution of the civil case,  
10 was it centered around the forfeiture of some or all  
11 of the proceeds of the royalties?  
12 A. You know, there were both monetary and  
13 nonmonetary terms at issue. And I can't tell you,  
14 sitting here now, how exactly the issues were  
15 presented and kind of ripened.  
16 But there were monetary issues about  
17 whether or how much of a forfeiture Mr. Bissonnette  
18 would be required to make.  
19 And there were nonmonetary issues that  
20 included their desire for an apology, their desire  
21 that he surrender his Trident, their desire that he  
22 agree to a debriefing and an inventory of electronic

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1 records to make sure that he had no classified  
2 information in his possession.  
3 As I said, there was a mix of monetary and  
4 nonmonetary terms.  
5 Q. I'm going to focus on the nonmonetary  
6 terms in a moment. Just on the monetary terms, was  
7 there any discussion of a percentage or an offer made  
8 to the government to resolve at least the monetary  
9 side of it?  
10 A. You know, for starting at the end of 2012  
11 and for a very long period of time, we went back and  
12 forth on those issues. And at some point Mr. Johnson  
13 transitioned to Homeland Security, I think, in  
14 December, the end of 2012. So he became secretary of  
15 Homeland Security. Obviously, exited this dialogue.  
16 And then the dialogue was continued with  
17 Mr. Easton and then very quickly thereafter folks  
18 from the civil division at the Justice Department  
19 became involved in the conversation.  
20 And there were a series of meetings and  
21 conversations about what was an appropriate financial  
22 penalty. And those continued, I think, until the

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1 spring of the following year. I mean, it didn't move  
2 smoothly or quickly.

3 Q. And I'm focusing up and through December  
4 of -- the end of December of 2012 just so that I'm  
5 following this court's ruling.

6 So let's just stick with dealing with Jeh  
7 Johnson and Mr. Easton. Was there any offer made in  
8 terms of a percentage of the royalties being  
9 forfeited?

10 A. You know, there probably was, and I don't  
11 recall when that was first put on the table or what  
12 we proposed, but the answer is probably yes.

13 Q. Was the issue of coming up with a  
14 resolution of the forfeiture side of it, the monetary  
15 side of it, discussed initially at the September  
16 20th, 2012 meeting?

17 A. No. I don't think so.

18 Q. Who made the first offer?

19 A. Couldn't tell you. I think either that  
20 meeting or in the conversations that followed. As I  
21 said, there were other meetings in Mr. Johnson's  
22 office and then there were phone calls, including

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1 one-on-one calls between Mr. Johnson and myself.

2 You know, we pretty quickly decided that  
3 we would put ourselves on a path towards resolution.  
4 But sitting here, I simply can't tell you when or --  
5 when was the first time that a sort of percentage was  
6 put on the table or by whom. I just don't recall.

7 Q. And was Mr. Bissonnette apprised of these  
8 discussions about the forfeiture throughout?

9 A. Yes. I mean, I would not have made an  
10 offer without clearing it with him first. And if the  
11 government had made an offer, I would have related  
12 that to him.

13 Q. And I take it that Mr. Podlaski was not  
14 involved in those discussions in any form in terms of  
15 the forfeiture either relaying offers or conveying  
16 offers by the government?

17 A. No, he was not. He was not involved in my  
18 communications with the government. What I don't  
19 recall is whether I kept him apprised or not. I  
20 simply don't recall.

21 Q. And it's not a memory test because I think  
22 I can find the email. But in November of 2012, there

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1 was a term sheet that was exchanged with the  
2 government about a resolution of the forfeiture side  
3 of things.

4 Do you recall that?

5 A. You know, I mean, it wouldn't surprise me  
6 that there was a term sheet exchanged in that time  
7 period. This thing went through so many iterations  
8 that I honestly can't tell you what was proposed  
9 when.

10 Q. I'm going to mark it as an exhibit because  
11 I want to see if it triggers a memory for you. This  
12 will be Exhibit Number 122. And it's an email LUS  
13 ending 1003. It's a one-page document.

14 (Exhibit Number 122 was marked for  
15 identification and was attached to the deposition.)

16 BY MR. FURMAN:

17 Q. Document 122 is a copy of an email  
18 exchange on -- beginning on November 19th of 2012 and  
19 ending on November 22nd, 2012.

20 The email from you, Mr. Lusk, on Monday,  
21 November 19th of 2012 at 5:24 p.m. is addressed to  
22 Mr. Bissonnette, Mr. Fabiani, and Elyse Cheney. And

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1 in substance, it's describing a term sheet that was  
2 received from the Department of Defense.

3 Do you see that?

4 A. I do.

5 Q. Does -- if you take a second to read --  
6 not a second -- as much time as you need to read the  
7 email, would that refresh your recollection as to  
8 what the terms were that were proposed by the  
9 government?

10 A. Let me -- give me a minute to read it and  
11 then I'll answer your question.

12 Q. Now, having read this email, does it  
13 refresh your recollection, one way or another, as to  
14 what offers were made by the government at that time?

15 A. You know, it doesn't in terms of what the  
16 dollars was. It refreshes my recollection to the  
17 extent -- on the monetary terms to the extent that,  
18 among the things we were discussing at this time,  
19 based on Matt's desire that a significant portion of  
20 the proceeds of the book be donated to charities that  
21 supported veterans and in particular Special Forces  
22 Veterans that we were discussing at this time the

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1 possibility of whether it was possible either for  
2 Matt to satisfy his obligation to the government by  
3 donating money to these charities or to give the  
4 government the money with the understanding that it  
5 would gift those groups.

6 And there were specific legal concerns  
7 under the Appropriation's Act about whether that  
8 could be done and whether it would create tax  
9 liability and so forth.

10 But -- and this certainly does refresh my  
11 recollection that we were wrestling with those issues  
12 and talking about a much more complex structure than  
13 we finally reached.

14 But in terms of what the value of the  
15 dollar proposals were, I'm -- I can't help you. I'm  
16 sorry.

17 Q. And in the weeks or even the month  
18 preceding November 19th of 2012, do you have any  
19 recollection, one way or the other, as to what the  
20 government was seeking in terms of a resolution of  
21 the forfeiture?

22 A. No, I don't.



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1 Q. Now, the response by Elyse Cheney to your  
2 email, which is dated a few days after on November  
3 22nd of 2012, references the fact that General  
4 Petraeus was writing a book and that Mark Boal, one  
5 of the producers of, "Zero Dark Thirty," the film,  
6 had sold rights to the screenplay, to a publisher for  
7 it to come out in book form.

8 Do you know why that was her response? Do  
9 you know what the context was, why she was responding  
10 to you in that fashion?

11 A. Well, I think -- I think Elyse's reaction  
12 was a sort of protective layperson's reaction.

13 And in a somewhat more refined form and  
14 argument we made to the government, which is there's  
15 all kinds of stuff being published out there, some of  
16 it without prepublication review, some of it with the  
17 support of the government.

18 Why are you picking on the one person who  
19 risked his life to actually kill this guy to try and  
20 exact your pound of flesh?

21 And I think Elyse felt like Matt was being  
22 screwed and that people higher up the food chain were



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1 managing to find a way either in Washington or  
2 Hollywood to do just fine, notwithstanding in  
3 Petraeus's case his disgrace and in Boal's case that  
4 he's a Hollywood screenwriter and that the government  
5 was focusing on that.

6 And I think Elyse always felt pretty  
7 aggrieved about that. And, you know, we did, too.  
8 And it was a point that we made in our discussions  
9 with the government in a somewhat different way, but  
10 it was certainly something we wanted to convey.

11 Q. And that argument, you raised it before.  
12 You mentioned in dealing with the OPR that there are  
13 situations where there's information that's already  
14 in the public domain and that you could cite to them  
15 in dealing with the prepublication process.

16 Was that something that was discussed with  
17 Jeh Johnson in terms of, "No Easy Day," the fact that  
18 so much of what the details were about Operation  
19 Neptune Spear that were in, "No Easy Day" were  
20 actually already in the public domain?

21 A. We talked a lot about both the equities  
22 and the optics of their pursuit of Matt. In various



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1 forms, those were points that I certainly made both  
2 to Jeh and then subsequently to Bob Easton and to the  
3 folks at DOD who joined the conversation.

4 And, you know, I can recall one specific  
5 occasion when the DOJ civil folks were there. And I  
6 said: "Look, you folks are proposing, among other  
7 things, if we can't reach an agreement to bring an  
8 equitable action."

9 And in an equitable action, one of the  
10 things that you will need to prove is the fact that  
11 you have clean hands.

12 And so it would be relevant and I think  
13 admissible for us to put people on the stand and ask  
14 them whether they leaked about Operation Neptune  
15 Spear and then make the argument to the court that  
16 the government really in seeking a forfeiture from  
17 Matt was choosing the speaker, rather than choosing  
18 to protect the message.

19 "And we'll start by calling Vice President  
20 Biden," I said, "at this meeting," at which point  
21 someone from -- one of the DOJ civil folks said,  
22 "Well, we don't have any problem with that."



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1 And my response was: "They don't let you  
2 out much, do they?" Only a bureaucrat at the  
3 Department of Justice who doesn't actually have to go  
4 to court could possibly have said that.

5 But it was a continuing -- it was a  
6 continuing theme for us and something we, you know,  
7 tried to use, among other things, as leverage to try  
8 and get the most favorable financial settlement that  
9 we could for Matt.

10 Q. It at least sounds to me like a very  
11 convincing argument. Why didn't you pursue it?

12 MR. PATRIZIA: Object to the form.

13 I'll permit the witness to answer.

14 BY MR. FURMAN:

15 Q. I know you conveyed it. But ultimately,  
16 there was a settlement for 100 percent of the  
17 forfeiture. So my question is: Why wasn't that  
18 argument used?

19 A. First, let me jump ahead here to the  
20 premise of your question.

21 It wasn't 100 percent of the proceeds  
22 because the actual proceeds from that were north of

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1 \$8 million. But Elyse Cheney had a contract with  
2 Matt that entitled her to 15 percent of whatever he  
3 earned.

4 And so there is \$1 million 3 or \$1 million  
5 4 that is topped off of that. And the agreement that  
6 we negotiated is net of Elyse's payment and it also  
7 is written in such a way that it is net of the tax  
8 payment.

9 And so, again, had the government  
10 proceeded in a contested proceeding, they would have  
11 gotten a judgment for the entire amount of the  
12 proceeds. And it would have been up to Matt to seek  
13 a refund from the IRS and if they declined to refund  
14 that money to file an action in tax court to try and  
15 get it back.

16 But otherwise, as a legal matter, he's  
17 potentially obligated for even the money he's paid  
18 over to the Treasury in the form of taxes.

19 And finally, he's permitted to pay out the  
20 amount that is due to them, which is about \$1  
21 million, 3 after the tax issue is resolved at no  
22 interest over four years.

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1 So on the one hand, it's written as a  
2 forfeiture of all of the proceeds. But in fact, as a  
3 financial matter, it's not.

4 Q. And what is that figure? Do you know what  
5 that figure is?

6 MR. PATRIZIA: By that figure, you mean --

7 BY MR. FURMAN:

8 Q. What's the net figure that Mr. Bissonnette  
9 paid to the government?

10 A. Well, he paid about -- and it's in the  
11 consent decree.

12 So I'm giving you my recollection of the  
13 dollar figures that are recited with precision in the  
14 consent decree. But I think he paid over about \$2.7  
15 million. I think he owes about \$1.3 over four years.

16 And then the way it is structured is that  
17 he has six months in which to file for refunds with  
18 the IRS and state tax authorities.

19 If he gets that money back, he has to pay  
20 it over to the government. But if he doesn't, he's  
21 not obligated for it.

22 Q. I see. And do you know whether or not,

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1 one way or the other, to this day whether that has  
2 taken place as to whether Mr. --  
3 (Whereupon, there was a telephone  
4 interruption.)

5 Do you know, one way or the other, whether  
6 that has taken place, the tax refund?

7 A. I think that he has filed for the refunds.  
8 He has not gotten anything back at this point. And I  
9 do know that the window for filing an amended return,  
10 which is the way in which you apply for a refund, is  
11 a three-year window.

12 So for the taxes that were paid on income  
13 that he earned in 2012, which would include the  
14 advance or prior years, that's time barred. So  
15 they'll be no refund for tax year 2012.

16 And I think he either has or is in the  
17 process of filing the refunds for tax years '13, '14,  
18 and '15.

19 And he has, I think, under the agreement,  
20 six months to do so. So it would be ripe next month,  
21 no later than next month.

22 And that was all by way of really sort of

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1 being clear about the premise of your question.

2 Q. The premise being 100 percent?

3 A. Right. And I think my own judgment is

4 that the arguments I outlined to you before about

5 clean hands and so forth have probably got more

6 impact in terms of their optics than they do as a

7 legal matter because the government, I think, has in

8 other cases successfully taken the position that it

9 doesn't really matter who leaks what.

10 Information remains classified until it's

11 unclassified and you're accountable for your own

12 behavior.

13 So it was an argument, I think, that was

14 designed to push them back and to suggest that we

15 weren't completely kind of bootless if we couldn't

16 reach an agreement, but I didn't think it was a

17 winning argument.

18 Q. And that deals with the equitable

19 argument. As far as the contractual arguments, the

20 defense, was there any after your review of the SNEPP

21 doctrine and also your access to the additional

22 information that connected the 2007 SCI to Operation

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1 Neptune Spear?

2 A. I mean, I'm not sure I understand your

3 question.

4 Q. I'll ask it again. I'll rephrase it

5 maybe.

6 As far as the contractual defenses -- I'm

7 putting aside the equitable arguments that were

8 pushback arguments.

9 But in terms of the contractual defenses

10 to the government's argument that was outlined in Jeh

11 Johnson's letter that advised that Mr. Bissonnette

12 was in default of his contractual obligations, did

13 your subsequent review of the SNEPP doctrine and also

14 your access to information at the Jeh Johnson meeting

15 on September 20th of 2012 where he showed you

16 additional documents that connected the 2007 SCI

17 nondisclosure agreement that Mr. Bissonnette signed

18 to Operation Neptune Spear -- did that change your

19 view about the contractual defenses?

20 MR. PATRIZIA: Object to the form.

21 MR. FURMAN: It's a really long question.

22 MR. PATRIZIA: I take it what you're

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1 asking is whether Mr. Lusk had any further view of

2 the viability of a defense to the argument by Mr.

3 Johnson that Mr. Bissonnette had breached his

4 contractual obligations under the Form 1847 --

5 MR. FURMAN: Correct.

6 MR. PATRIZIA: -- once Mr. Lusk had seen

7 whatever documentation Mr. Johnson provided

8 concerning the acronyms on the bottom of the 1847

9 form?

10 MR. FURMAN: As well as his review of the

11 SNEPP doctrine.

12 MR. TOBEY: I'll object to the form of the

13 recharacterization.

14 MR. PATRIZIA: If Bob understands the

15 question, I'll permit him to answer. It's a

16 complicated question.

17 A. My answer is really in two parts. My

18 thinking on the contractual side didn't change

19 materially.

20 It seemed to me that we could and still

21 did argue that the SCI agreement was not a model of

22 clarity and that there were ambiguities that, if we

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1 needed to, we could attack. But I did not think then

2 and don't think now that those are very strong

3 arguments.

4 I mean, they're arguments that you can

5 make, but not particularly good ones. And in any

6 event, the government has had such consistent success

7 using the SNEPP doctrine that it sort of overtook the

8 contractual issue.

9 And in my view, this is part of the reason

10 why the government has not been more scrupulous about

11 revising these agreements in ways that would make

12 them better.

13 Q. And I want to follow up on something that

14 you had mentioned about Elyse Cheney's layperson

15 perspective and her pointing out General Petraeus's

16 situation in, "Zero Dark Thirty."

17 Was there a view that you tried to express

18 to the government that there was selective

19 prosecution against Mr. Bissonnette?

20 A. Oh, sure and the view that they were

21 picking on the person at the bottom of the food

22 chain, rather than the top.

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1 But particularly in the civil context, the  
2 government is certainly free to pick and choose from  
3 among the viable potential legal claims that it could  
4 make.

5 And there's really no strong doctrine of  
6 selective prosecution on the civil side that would be  
7 a viable defense.

8 And even on the criminal side, in order to  
9 establish a claim of selective prosecution, you have  
10 to establish that the selectivity was for a  
11 constitutionally impermissible purpose; for example,  
12 race.

13 And if there were a criminal prosecution,  
14 I am quite sure that we would have tried to raise the  
15 objection that the government was impermissibly  
16 prosecuting him on the basis of -- for, first --  
17 improper First Amendment grounds by trying to select  
18 the speaker.

19 That would have been a very hard road to  
20 hoe, but it's certainly an argument we would have  
21 made in that context.

22 Q. And this is before September 4th of 2012.

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1 Did you discuss with Mr. Bissonnette the potential  
2 that the government was reacting to the book, among  
3 other -- for among other reasons, the fact that it  
4 was critical at certain points in the book of  
5 President Obama and Vice President Biden and the  
6 Obama Administration?

7 A. You know, I don't -- it's certainly -- in  
8 those very first few days, I don't think that we  
9 talked about that issue. It's possible, but I don't  
10 recall that and had never thought, having read the  
11 book -- and did not think having read the book --

12 Q. Having read the book?

13 A. -- having read the book that the  
14 government's reaction was animated by partisan  
15 political reasons.

16 Overall, publicity about Operation Neptune  
17 Spear was generally helpful to the administration,  
18 even when it might have been critical at various  
19 points of a few individuals.

20 Q. I'm turning now to the legal fees.

21 My understanding -- and I want to know if  
22 it's accurate -- is that Mr. Bissonnette paid

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1 approximately \$828,000 for legal services that you  
2 rendered both at Patton Boggs and Paul Hastings.

3 Is that accurate?

4 A. You know, I actually thought it was  
5 slightly more than that. But, you know, I thought it  
6 was just over \$1 million. But that certainly is in  
7 the ballpark.

8 Q. Now, I understand that in addition to  
9 dealing with the civil forfeiture and potential  
10 criminal prosecution that related to the publication  
11 of, "No Easy Day" that the government had undertaken  
12 additional investigations into Mr. Bissonnette.

13 Is that fair to say?

14 A. That is correct.

15 Q. And among other things, there wasn't an  
16 investigation over certain artifacts, for lack of a  
17 better way of describing it, that Mr. Bissonnette had  
18 from the Bin Laden raid, including a photograph of  
19 Mr. Bin Laden's body.

20 Do you recall that?

21 A. Yes.

22 Q. When did that first take place?

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1 A. It wasn't separate. So let me see if I  
2 can tell you about the criminal investigation.

3 By, I guess, early spring of 2014 we had  
4 reached what I would call a handshake agreement to  
5 resolve the civil matter. And it's reflected in a  
6 term sheet or memorandum.

7 Q. Can you say that date again? I missed  
8 that.

9 A. It was probably March, maybe April of  
10 2014. And there's an exchange of emails between me  
11 and Mr. Easton where he sends me a copy of the term  
12 sheet and I confirm to him that, in my view, it  
13 accurately sets forth our understanding.

14 And he indicates that he would then take  
15 responsibility for drafting the documents that would  
16 reflect the agreement as a formal legal agreement.

17 And nothing happened for six weeks, eight  
18 weeks. And I kept bugging him. And then finally, he  
19 said: "Well, there's a wrinkle. It turns out  
20 there's a criminal investigation. And can you attend  
21 a meeting at Main Justice?

22 "And by the way, you'll need to get your

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1 security clearance reinstated for the purpose of this  
2 meeting."

3 And I think before this meeting -- it may  
4 have been shortly after the meeting was at a -- but  
5 in connection with that, we had a meeting.

6 Present were folks from the National  
7 Security Division Counterintelligence section at DOJ  
8 and an assistant U.S. Attorney from the Southern  
9 District of California.

10 And they explained that they were  
11 conducting an investigation, a criminal  
12 investigation, into the potential wrongful disclosure  
13 of classified information in connection with the  
14 publication of, "No Easy Day" and that there were  
15 also some ancillary matters that they wanted to  
16 inquire of, including whether or not he had retained  
17 photographs of Bin Laden's body and whether he had  
18 any artifacts that he shouldn't have kept.

19 And the government said in the context of  
20 this criminal investigation that they wanted Mr.  
21 Bissonnette's complete and candid cooperation to  
22 include disclosure of all objects he might have that

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1 were relevant, all electronic media, including hard  
2 drives, computers, cell phones, anything like that,  
3 and access to all of his email accounts for the  
4 purpose of conducting this investigation.

5 And we agreed to those terms. And at that  
6 point, you know, the civil matter was essentially  
7 suspended while the criminal investigation was  
8 undertaken.

9 And that process then continues from late  
10 spring, early summer of 2014 until on or about August  
11 of 2015 when the government says that they have  
12 declined to pursue any criminal case against Mr.  
13 Bissonnette.

14 And so the primary focus of that criminal  
15 investigation was the wrongful disclosure of  
16 classified information, but in connection with that,  
17 they looked at everything that might be tangentially  
18 related to that to include the photographs and any  
19 artifacts.

20 Q. Well, in terms of artifacts, we recently  
21 took the deposition of Ben Sevier. Are you aware  
22 that that deposition took place?

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1 A. No.

2 Q. And did you review a transcript of that  
3 deposition or were you told about it in any form?

4 A. No.

5 Q. In the course of that deposition, Mr.  
6 Sevier described for us a meeting in December of 2011  
7 where he met with Mr. Bissonnette and Elyse Cheney  
8 and Mr. Bissonnette produced a hat that apparently  
9 was Bin Laden's hat, which, I guess, would fall under  
10 the category of being an artifact from the Bin Laden  
11 raid.

12 Were you aware of that, that Mr.  
13 Bissonnette had in his possession Bin Laden's hat?

14 A. I wasn't aware of it until the government  
15 asked in connection with this meeting whether among  
16 the things that Mr. Bissonnette would produce were  
17 any artifacts. And Mr. Bissonnette produced the hat  
18 and turned it over to the government. I had not  
19 previously been aware of that.

20 Q. And the reports of their being a  
21 photograph of Mr. Bin -- strike that -- there being a  
22 photograph of Bin Laden's body, were you aware that

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1 there were media reports about that before your  
2 meeting with the government about this inventory of  
3 items from Mr. Bissonnette?

4 A. I had seen countless reports and internet  
5 photographs alleging that they were photographs of  
6 Bin Laden's body.

7 Until the government raised the issue with  
8 me, I had never heard of any suggestion that any of  
9 these was in any way connected with Mr. Bissonnette,  
10 nor subsequently have I ever seen any evidence that  
11 those were connected with Mr. Bissonnette.

12 Q. And are you aware through your  
13 conversations with Mr. Bissonnette that his role,  
14 among other things, in connection with Operation  
15 Neptune Spear was to take photographic images of the  
16 operation and bring them back to his superiors? Were  
17 you aware of that?

18 A. You know, now, we're getting into some  
19 difficult territory because once the criminal  
20 investigation began, my security clearance was  
21 revived.

22 I was then, from the government's

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1 perspective, free to talk to them and to Mr.  
2 Bissonnette about anything, including information  
3 that might be classified, with the understanding that  
4 I would not further disclose it.

5 And so that encompassed things that the  
6 government shared with us in the proffer. It also  
7 encompasses things that Mr. Bissonnette shared with  
8 me.

9 So I'm -- we're on perilous ground here in  
10 terms of what I'm free to answer consistent with my  
11 obligations.

12 Q. And the reason I'm asking it, just so that  
13 -- for your -- obviously, for your benefit and for  
14 the benefit of Mr. Patrizia and Mr. Tobey is that you  
15 had referenced that it's connected, that it's -- to  
16 the inquiry about the publication of the book.

17 And I want to explore that because there  
18 is some billing -- substantial amounts of billing --  
19 we won't have the time to go line item through it --  
20 that deal with issues, for example, dealing with this  
21 criminal investigation to the artifacts, the  
22 investigation of the Element Group activity, and

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1 other activity that Mr. Bissonnette was involved in,  
2 including the video game.

3 And so what I'm trying to understand is --  
4 I suppose we could do it.

5 But is there a way for me, other than  
6 asking you line by line item, what relates to your  
7 defense of Mr. Bissonnette in connection with, "No  
8 Easy Day" as opposed to other activities?

9 A. Fair enough. I understand the question.

10 MR. PATRIZIA: Subject to Mr. Tobey's  
11 agreement and my conversation with Mr. Lusk, my  
12 understanding is that the civil settlement with the  
13 Department of Justice and Department of Defense and  
14 the corresponding declination by the Department of  
15 Justice to prosecute Mr. Bissonnette with regard to  
16 what I'll call the Espionage Act Investigation and  
17 the related issues for which you obtained a security  
18 clearance are all related to, "No Easy Day."

19 Separate from that is what I understand to  
20 be the investigation of chief consulting. And I  
21 suppose the easiest way to distinguish those are  
22 whether it's the Southern District of California

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1 investigation or the Eastern District of Virginia  
2 investigation.

3 A. I guess. But I don't think that's  
4 completely correct, so that's why I want to --

5 MR. PATRIZIA: Please clarify that.

6 A. As Mr. Furman notes -- and he's correct --  
7 the Southern -- the investigation venued in San Diego  
8 in which the Main Justice and the U.S. Attorney for  
9 San Diego participated was principally an Espionage  
10 Act Investigation. And it primarily concerned the  
11 publication of, "No Easy Day."

12 But you are correct that in connection  
13 with that we also did work and produced chrons that  
14 relate, for example, to his interactions with the  
15 producers of, "No Easy Day" --

16 BY MR. FURMAN:

17 Q. Of Zero Dark Thirty?

18 A. I'm sorry -- of "Zero Dark Thirty" --  
19 you're correct -- and related matters so that  
20 included within those billings are some matters that  
21 don't directly arise from the publication of, "No  
22 Easy Day."

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1 And, you know, spending time here going  
2 through those time sheets would be hateful. But  
3 there's got to be a better way to do that.

4 MR. PATRIZIA: Let me make a proposal and  
5 see. I think the basic proffer I would make, subject  
6 to counsel's agreement, is we would go through with  
7 Mr. Lusk the invoices you have produced as Exhibit  
8 117.

9 And we would call out from that those  
10 pieces which would relate to the investigation in the  
11 Eastern District of Virginia because I understand  
12 that, A) those fees aren't being claimed as damages  
13 in this proceeding; and B) your testimony, Bob, is  
14 that they don't relate to, "No Easy Day" as such --

15 A. That's right.

16 MR. PATRIZIA: -- although, there's some  
17 leakage between the two, but let's not go there; and  
18 second to the degree Mr. Bissonnette's counsel agrees  
19 that legal fees related to Mr. Bissonnette's contacts  
20 with the producers of "Zero Dark Thirty" or the --

21 MR. FURMAN: Video game?

22 MR. PATRIZIA: -- manufacturers at

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1 Electronic Arts of Medal of Honor Warfighter.  
2 And I'm trying to think if there's  
3 anything else in that opinion grouping. I don't  
4 think so.  
5 But if the agreement is that those are not  
6 being claimed as damages, I will make a proffer that  
7 we will go through Exhibit 117 and identify which of  
8 the line items in 117 are related to those elements  
9 as opposed to the publication of, "No Easy Day" and  
10 the Espionage Act Investigation as such.  
11 And we'll produce it back to you with some  
12 rendition of which items are not and what the fees  
13 related to that would have been.  
14 A. Yeah. And I would add it is going to be a  
15 very easy matter to exclude the fees arising from the  
16 Eastern District of Virginia because we literally  
17 didn't know about that until October of 2016.  
18 And so --  
19 MR. TOBEY: '15.  
20 A. '15. I'm sorry. I've lost track here.  
21 But temporally, it's a pretty easy matter. Those are  
22 a very easy matter to exclude.

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1 I also think looking back at the main  
2 criminal investigation it's something that we ought  
3 to be able to separate because the bulk of the fees  
4 that would be attributable, for example, to  
5 Electronic Arts or "Zero Dark Thirty" are going to be  
6 in the form of time from Zach Adams preparing a  
7 chronology and collecting emails, and those should be  
8 fairly easy to segregate.  
9 MR. PATRIZIA: But I'll make that proffer,  
10 subject to counsel's agreement. And I don't know,  
11 Bob, that's probably going to take us a week to do  
12 it, just in terms of time.  
13 MR. FURMAN: I don't think that we're  
14 desperate for time. We have a trial date or --  
15 MR. TOBEY: A get-ready --  
16 MR. FURMAN: -- a get-ready-by date,  
17 November, I think, 14th of this year.  
18 MR. PATRIZIA: From my days in the  
19 government, I would characterize it as a  
20 hurry-up-and-wait date.  
21 MR. FURMAN: That's fair to say. What I'm  
22 trying to avoid is probably another three hours of

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1 this deposition.  
2 MR. PATRIZIA: Look, I don't have a  
3 problem saying we'll do it as promptly as we can and  
4 we'll tell you exactly what we think, you know, is  
5 excluded on that basis.  
6 What happens from there, I don't know.  
7 But I'm happy to make the proffer and that we'll  
8 proffer that it would have been what would have come  
9 out of testimony.  
10 BY MR. FURMAN:  
11 Q. And just to sort of put a parameter around  
12 the time element of it, is it fair to say -- and I'll  
13 ask this question to Mr. Lusk so we at least have  
14 it on the record -- that as of the conclusion of the  
15 consent decree that was in August of 2016 -- it was  
16 around that time that at least as far as the  
17 publication of, "No Easy Day" was concerned that that  
18 was the end of your representation of Mr.  
19 Bissonnette, as far as that chapter is concerned?  
20 A. Well, you know, I mean, I certainly still  
21 represent him since the consent decree is executory.  
22 And so there are certain obligations he still has to

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1 fulfill and I need to protect him in connection with  
2 those.  
3 But the simple answer after that is, I  
4 stopped billing him. You know, once he turned that  
5 money over, there's no longer corpus from which to  
6 pay legal fees. And he doesn't have the means to pay  
7 them, and so I just stopped recording my time.  
8 MR. FURMAN: I just want to throw in a  
9 response to Mr. Patrizia's proffer. I would agree to  
10 that and just -- if we have any questions about it,  
11 we could either try to do it by some kind of form of  
12 interrogatory or some limited deposition to ask  
13 further questions.  
14 I certainly appreciate how valuable Mr.  
15 Lusk's time is, your time, and Mr. Tobey's time,  
16 mine excluded.  
17 MR. PATRIZIA: I think what we could say  
18 is we'll produce some form of an accounting rendition  
19 identifying the entries which we think are not  
20 related to, "No Easy Day" and the Espionage Act  
21 Investigation. So we'll identify those, the time and  
22 the amount.

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1 If you then have follow-up questions as to  
2 those, we can try to either work through an amendment  
3 of that proffer or do interrogatories. And if we  
4 need to have a dep, we'll do a dep.

5 MR. TOBEY: You could structure it as it's  
6 an attachment to the deposition so it becomes part of  
7 the sworn testimony.

8 Our position is that I think we could make  
9 a persuasive argument that all of the collateral  
10 issues were caused by the failure to get a  
11 prepublication review and the government's  
12 disapproval of that.

13 But I think in terms of just the exercise  
14 of having that segregation done now, it makes sense.  
15 We can always argue about entitlement later, but I  
16 understand your argument that it is appropriate to  
17 segregate it out.

18 I understand their offer to do it and I'd  
19 say let's do it and save the time today so we don't  
20 need to go through that.

21 MR. FURMAN: I understand. Only because I  
22 feel like I want to respond because I think it's

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1 funny, I don't think Mr. Podlaski could be  
2 responsible for Mr. Bissonnette taking Bin Laden's  
3 hat.

4 MR. TOBEY: Well, and the issue is whether  
5 the government ever would have come after him for  
6 having Mr. Bin Laden's hat.

7 MR. FURMAN: That's a dangerous, slippery  
8 slope of Tort Law that Mr. Patrizia and Mr. Lusk  
9 happily don't get themselves involved in very often.

10 MR. PATRIZIA: It's not my issue.

11 A. I'm a stranger to that argument.

12 MR. FURMAN: I just need a five-minute  
13 break, if that's okay?

14 MR. PATRIZIA: Something I want to say  
15 before we break is, we will work from Exhibit 117  
16 unless someone gives us a different set of invoices  
17 to work from.

18 MR. FURMAN: Fair enough.

19 (A break was taken.)

20 BY MR. FURMAN:

21 Q. Mr. Lusk, there came a point in time in  
22 your dealing with the Eastern District of Virginia --

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1 and I think the Assistant U.S. Attorney was Steven  
2 Peak?

3 A. No. Steven Peak is from the Southern  
4 District of California. He was one of the two folks  
5 who were involved in the original criminal  
6 investigation. The assistant assigned in the Eastern  
7 District of Virginia is Alan Salsbury.

8 Q. Right. And I got that wrong, and I  
9 apologize. I meant to say San Diego. And I am  
10 referencing the Southern California investigation by  
11 Steven Peak.

12 There became an issue regarding missing  
13 documents that were missing in some form or another  
14 from Mr. Podlaski's production of his file?

15 MR. PATRIZIA: Object to the form. I  
16 think the issue was documents that the government had  
17 from a production by either Mr. Podlaski or the  
18 Carson firm and that Mr. Bissonnette or his counsel  
19 did not have.

20 So I don't know that it was documents that  
21 were missing from Mr. Podlaski's or Carson's  
22 production to Mr. Peak or to the government, but that

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1 were not in the possession of Mr. Bissonnette and his  
2 counsel.

3 With that clarification, I'm fine.

4 MR. FURMAN: I see. And I might have  
5 misconstrued that.

6 A. We'll assume you're asking the question:  
7 Was there a dispute about or an issue or controversy  
8 about documents. I can happily answer it in those  
9 terms.

10 BY MR. FURMAN:

11 Q. Yes. And could you describe that  
12 controversy?

13 A. Sure. And at the beginning of the  
14 criminal investigation, the sort of fundamental  
15 operating premise was that we were going to  
16 completely undress in the sense that Mr. Bissonnette  
17 would turn over access to all of his email accounts,  
18 social media, any computers he had, et cetera, et  
19 cetera.

20 And all of those materials, his wife's  
21 desktop computer, all of these would be turned over  
22 and examined by the government, that the government

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1 would have a taint team to include potentially  
2 privileged information relating to my representation  
3 of Mr. Bissonnette subsequent to the publication of,  
4 "No Easy Day," but that we would waive privilege.

5 And the government would agree that it  
6 would be a limited privilege as to all communications  
7 that Mr. Bissonnette had with Mr. Podlaski prior to  
8 the publication of the book relating to the issue of  
9 whether or not the book needed to be submitted for  
10 prepublication review and so forth.

11 And as Mr. Peak kept saying, although I  
12 think he was somewhat inaccurate, complete candor  
13 from Mr. Bissonnette, including the complete  
14 production of all relevant information was his get  
15 out of jail free card.

16 I think, in fact, what Mr. Peak meant by  
17 that -- although he kept calling it the get out of  
18 jail free card -- was that it was a fundamental  
19 necessary condition of his cooperation in the  
20 criminal investigation, but didn't necessarily mean  
21 that if that's all he did and answered all the  
22 questions truthfully that the government would

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1 necessarily decline to prosecute.

2 But the precondition was complete candor  
3 and complete cooperation. And in connection with  
4 that, we had a file of documents that Mr. Podlaski  
5 and/or Carson Boxberger had produced to Mr. Johnston.

6 And we made a copy of that disk having  
7 been advised that this was the file and turned it  
8 over to the government and said, "We waive privilege  
9 as to these documents."

10 "By the way, we will write you a letter so  
11 that you can show it to Carson Boxberger and Mr.  
12 Podlaski to confirm that they're free to disclose  
13 this information to the government and they're not  
14 subject to any privileges that Mr. Bissonnette has"  
15 and represented to the government based on what we  
16 were told that this was the complete file.

17 At some point during either the first or  
18 the second proffer session -- and I can't tell you  
19 which -- Mr. Peak produced a document or a couple of  
20 documents that he represented that he had gotten from  
21 the -- from the law firm and that we had not  
22 produced.

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1 And he very aggressively challenged me  
2 about our having breached our duty of candor to him  
3 and accused me of having edited the file or cleaned  
4 up the file before giving it to the government.

5 Q. What were those documents?

6 A. You know, they were letters and emails and  
7 things that we had not yet seen. They didn't seem --  
8 in the context of the conversation we were having, I  
9 don't even recall what they were. I mean, they were  
10 unexceptional.

11 They didn't contradict any other documents  
12 that we had and then produced and weren't  
13 inconsistent with anybody's testimony. It was  
14 focused on this issue about whether we had been  
15 candid with Mr. Peak about having produced the  
16 complete file.

17 And we had a very heated conversation  
18 about this.

19 Q. How many documents? I just want to get a  
20 sense of what we're talking about here.

21 A. You know, I only saw a handful. But Mr.  
22 Peak represented to me that there was a substantial

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1 number. But he didn't sit down and say, here are all  
2 the documents that we have that you didn't produce.

3 He showed me some documents that we hadn't  
4 seen before. And I said: "We've never seen these."  
5 And he represented that there were a substantial  
6 number of additional documents that he had  
7 subsequently received from the law firm that we had  
8 failed to produce.

9 Q. That dispute over missing documents that  
10 you just described has found its way into the  
11 complaint against my clients.

12 And what I'm trying to understand and get  
13 my arms around is what are we talking about? What  
14 are those documents? Who has them? What do they  
15 consist of?

16 A. Well, you know, I'm --

17 MR. PATRIZIA: Object to the form.

18 MR. TOBEY: Object to the form.

19 MR. PATRIZIA: Is there a question

20 pending?

21 MR. PURMAN: There's four questions

22 pending.

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BY MR. FURMAN:

Q. Well, let's break them down, what are they?

A. Having not seen the set of documents that were produced to the government by the law firm and, therefore, not having had an opportunity to compare that set with the set that was given to us on disk by Mr. Johnston and then copied and produced to the government, I can't tell you what they were.

I only saw -- as I said, I only saw a handful of these, but Mr. Peak represented to me that the universe of documents was substantially larger.

Q. And if I understand what you -- your testimony is that, to your recollection, the documents didn't contradict or were, otherwise, not inflammatory in any way substantively?

A. Substantively, that's right.

Q. And the only issue was that Mr. Peak believed because of this undefined number of documents that were not produced to him that you in representing Mr. Bissonnette were not acting in full candor?



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A. That's exactly right. I mean, look, from my perspective in representing Mr. Bissonnette in the criminal matter, this called into question the fundamental basis for our relationship with the government, which was, there was going to be complete candor and full disclosure.

And so apart from the fact that the accusation offended me personally and professionally and Mr. Peak and I got into a prolonged screaming match over it because no one has ever accused me of that ever and I've never done it, it was potentially fatal to Mr. Bissonnette, because if the government believed that we had done that and Mr. Bissonnette was responsible, then kind of all bets were off in terms of the implicit promises that they had made that candor would be rewarded by a declination.

So it was important because of the process and its significance rather than for the underlying documents themselves.

Q. And other than a shouting match and blood pressure going up on both your end and Mr. Peak's end, did anything come of that, that situation?



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A. You know, I think you will see some prolonged back-and-forth by email about it because, obviously, I then went back to Mr. Johnson and said, "Can you confirm to me that this is the complete set as received from the law firm by you so that I can make sure that I was correct in making that representation to them and that there wasn't either a miscommunication by us or somehow a logistical problem"?

And he confirmed that it was. I went back to the government. And this issue percolated for a while. But I believe, you know, in large part because of the result in the case that ultimately it was resolved in our favor because I think if they had felt otherwise I don't think we would have gotten the declination.

Q. Do you know how long that issue percolated?

A. You know, I mean, it percolated for a couple months and then reemerged somewhat later because -- in a slightly different context because we had prepared chrons for the government in order to



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assist them in looking into in particular the, "No Easy Day" issue.

And they referenced emails that we had gotten from, among other sources, Mr. Bissonnette's email accounts.

And then in connection with the investigation, we provided access to the government to all of his email accounts.

And the government went back and they said -- with the understanding that if the government found anything on those accounts that they regarded as sensitive or clarified they could delete them, as well as if they found anything on the computer or the hard drive that was sensitive or classified, they could delete that.

And some months subsequently Mr. Johnson asked me, "I see a reference on your chron," which we had shared with them, "to an email between Mr. Bissonnette and Mr. Podlaski" -- and I believe it was in May of 2013. "Can I get a copy of that email?"

And I looked through. And I said: "We don't have a copy of that email. We looked at it



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1 from Mr. Bissonnette's account. We referenced it in  
2 our chronology. We don't have a copy. The  
3 government had access. And when access was restored,  
4 that email was missing."

5 So I wrote to Mr. Peak and said: "You  
6 know, you indicated to us that any material that you  
7 might have deleted would be archived because we were  
8 concerned that things that might be relevant in other  
9 proceedings would be destroyed and lost. Could we  
10 have a copy of this email?"

11 And essentially, there follows a  
12 back-and-forth over several days in which he keeps  
13 reminding me that I hadn't given him all the  
14 documents and you should get it from your own files  
15 or you should get it from Carson Boxberger and, you  
16 know, by the way, why didn't you ever give us all the  
17 stuff you were supposed to give him?

18 And I go back and say: "No. That isn't  
19 what this is about. This is stuff that you had  
20 access to on his email account that has nothing to do  
21 with that and had to spend, you know, another week  
22 tamping this issue back down again."

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1 Q. And I guess my prefatory remark is that in  
2 document-intensive cases things like this happen.

3 But beyond the back-and-forth, do you know  
4 whether or not in any way Mr. Bissonnette was damaged  
5 by this controversy over documents?

6 MR. TOBEY: Objection. Form.

7 A. Well, you know, what I can say was that he  
8 was threatened by it. But I would be hard put to  
9 quantify a damage.

10 BY MR. FURMAN:

11 Q. Have you been asked to be a witness at the  
12 trial of this case, this civil case?

13 A. No, I have not.

14 Q. Do you understand that you may be called  
15 as a witness in this particular case?

16 A. Yeah. I'm sure that's possible.

17 Q. Do you have an opinion on the services  
18 that Mr. Podlaski provided to Mr. Bissonnette?

19 MR. PATRIZIA: Object to form.

20 I'll permit the witness to answer.

21 A. Yes, I do.

22 BY MR. FURMAN:

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1 Q. What is that opinion?

2 A. I think that the advice that he gave him  
3 was wrong and that he should not have undertaken or  
4 represented that he could review the manuscript to  
5 exclude classified information.

6 Q. Did you form an opinion as to whether the  
7 book should have been submitted for a prepublication  
8 review?

9 A. Yes.

10 Q. And what's your opinion on that?

11 A. That it should have been.

12 Q. When did you reach those two opinions, the  
13 first one that Mr. Podlaski should not have  
14 represented that he could review the book to  
15 determine whether it contained classified information  
16 and; secondly, that the book should have been  
17 submitted for a prepublication review?

18 A. You know, it would be hard to pinpoint  
19 when that was. But it's certainly -- those opinions  
20 formed over time.

21 You know, I mean, I will tell you that  
22 certainly throughout the sort of operative phase of

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1 this representation whether or not Mr. Podlaski's  
2 representation met an appropriate standard really was  
3 not of any concern of mine whatsoever.

4 And I didn't spend any time thinking about  
5 it, because from my perspective, the important thing,  
6 as I said, this morning was that Mr. Bissonnette  
7 sought out someone who was qualified to provide  
8 advice to him on this subject and he got that advice  
9 and he followed it.

10 And beyond that, for the purposes of what  
11 I was doing, it didn't really matter. You know, the  
12 narrow question -- the larger question, I believed  
13 that we could not successfully defend a lawsuit if  
14 the government brought it on that issue.

15 But whether the advice is right or wrong  
16 is a very different thing from asking whether the  
17 advice was negligent. You know, we lawyers make  
18 judgments all the time.

19 And so my concern at the time was whether  
20 it was right or wrong and whether Mr. Bissonnette  
21 relied on it, not whether or not it met the  
22 appropriate standard of care.

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1 MR. FURMAN: I don't think I have any  
2 further questions -- famous last words. But I want  
3 to talk to my right hand.

4 MR. PATRIZIA: Okay. We'll go off the  
5 record.

6 (A break was taken.)

7 BY MR. FURMAN:

8 Q. Just one last question. You referenced  
9 the negligence part of it. I just wanted to follow  
10 up.

11 In terms of whether the book should have  
12 been submitted for prepublication and review, when  
13 did you come to the opinion that that's what should  
14 have happened?

15 A. Oh, I think I came to that conclusion  
16 probably in the first three to four months.

17 Q. And what triggered that view for you?

18 A. Well, I think what triggered that view for  
19 me was the risks posed by the SNEPP doctrine which  
20 would be obviated if the book had been submitted for  
21 review and the information shared with me by folks at  
22 DOD.



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1 Q. And is it fair to say that that your  
2 understanding of the SNEPP doctrine and also your  
3 access to the information provided by the Department  
4 of Defense relating to the nondisclosure agreement  
5 connecting 2007 to Operation Neptune Spear that you  
6 had that information as of September 20th of 2012?

7 A. Well, as I said, the information about the  
8 SCI agreement might have been in the first or the  
9 second meeting with DOD, but certainly relatively  
10 early on, I guess, would be a fair statement.

11 MR. FURMAN: I have no further questions.  
12 Thank you.

13 EXAMINATION BY COUNSEL FOR PLAINTIFF

14 BY MR. TOBEY:

15 Q. Mr. Lusk, my name is Robert Tobey. I  
16 represent Mr. Bissonnette in our lawsuit. Let me ask  
17 you a few background questions just so we have a  
18 little bit of a description of you.

19 Where did you go to college?

20 A. Harvard College.

21 Q. And that's the one in Boston?

22 A. Cambridge, actually.



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1 Q. And what did you study there?

2 A. I had a joint major in government and  
3 English literature.

4 Q. And did you go to law school after  
5 college?

6 A. Eventually.

7 Q. Eventually?

8 A. Yeah. I was in graduate school for three  
9 years at Oxford University studying English  
10 literature and then came back and eventually went to  
11 law school, graduated from Harvard Law School in  
12 1979.

13 Q. And did you have a Rhodes Scholarship  
14 doctrine (sic)?

15 A. I did.

16 Q. And at Harvard, did you obtain any honors  
17 as part of your graduation from law school?

18 A. From college or law school?

19 Q. Law school.

20 A. I was on the law review and I graduated  
21 magna cum laude.

22 Q. And after you graduated from Harvard Law,



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1 what did you do next?

2 A. I clerked for Judge Louis Oberdorfer,  
3 O-B-E-R-D-O-R-F-E-R in the United States District  
4 Court here in DC and then went to work in the Justice  
5 Department where I stayed for about 3 1/2 years.

6 Q. Did you work on any notable cases at the  
7 Justice Department?

8 A. I worked on -- Abscam was the very first  
9 case that I had when I was there.

10 Q. Well, that's a good way to start.

11 And you left the government, I take it?

12 A. That's right.

13 Q. Where did you go from there?

14 A. Joined a small firm which no longer exists  
15 called Onek, Klein & Farr. I specialized in Supreme  
16 Court litigation. Remained there until about 1990.  
17 Very briefly joined Powell, Goldstein, Frazier &  
18 Murphy in their Washington office.

19 Left that after about a year and a half.  
20 And with two friends, we formed our own law firm and  
21 stayed together until 2000 when I joined Patton  
22 Boggs. I remained there until almost exactly two



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1 years ago when I joined Paul Hastings.

2 Q. Great. And when did you start handling

3 government investigations both civil and criminal?

4 A. Well, I mean, I guess I started that when

5 I joined the Justice Department and have been

6 involved in those kinds of matters ever since then.

7 Q. Okay. And I take it with the Justice

8 Department you were on the prosecution end of the

9 scale?

10 A. That's right.

11 Q. And then when you went out and left the

12 Justice Department, you were handling the defense of

13 those matters?

14 A. That's right.

15 Q. So you've been handling those for more

16 than 30 years?

17 A. Yes, I'm afraid so.

18 Q. And can you tell us some of your notable

19 cases that you've defended? You mentioned Lance

20 Armstrong. What did you do for him?

21 A. Represented Lance in connection with the

22 criminal investigation that was conducted out of the

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1 Middle District of California into his alleged PED

2 use.

3 I represented Karl Rove in the special

4 prosecutor investigation into the leak of the

5 identity of a CIA agent.

6 I've represented a number and continue to

7 represent a number of large corporations in

8 high-profile matters.

9 I represented senior officials in The

10 White House during the Clinton years. I represented

11 a Deputy Attorney General in the Whitewater

12 investigation.

13 I represented a sitting federal judge in a

14 criminal case that went to trial in the Northern

15 District of California and eventually made its way up

16 to the Supreme Court.

17 Q. Have you argued in front of the Supreme

18 Court?

19 A. I have.

20 Q. On how many occasions?

21 A. Two.

22 Q. Two, okay. And have you received honors

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1 as a lawyer?

2 A. Well, I've been a part of the DC Circuit

3 Judicial Conference. I've received honors in the

4 Justice Department for exceptional service.

5 I've participated -- used to participate

6 in the ABA and was the chairman of the RICO

7 Forfeitures, Restraints, and Alternative Remedies

8 Committee.

9 And then I taught -- from 1990 to about

10 2007, I taught advanced criminal law at the

11 University of Virginia Law School and then starting

12 last year, I teach anticorruption at Georgetown Law

13 School.

14 Q. So let me ask you now moving on to Mr.

15 Bissonnette: You started representing him when you

16 were at Patton Boggs?

17 MR. FURMAN: Can I just interrupt?

18 MR. TOBEY: Yes.

19 MR. FURMAN: I want to object to that

20 whole line of questioning on the fact that I'm a mere

21 mortal.

22 MR. TOBEY: If you're a mere mortal, I'm

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1 not sure what that makes me. We've got a caste

2 system here, I'm afraid.

3 A. We can go off the record and I will tell

4 you a story that stopped --

5 (Discussion held off the record.)

6 BY MR. TOBEY:

7 Q. So you first started representing Mr.

8 Bissonnette while you were at Patton Boggs?

9 A. That's right.

10 Q. Alright. And did you -- I think you

11 identified in some questions from Mr. Furman the

12 nature of the team that you had working on this at

13 Patton Boggs?

14 A. Yes.

15 Q. There were several names, Ms. Gardner, Mr.

16 Zach --

17 A. Deschauer and General Nardotti were the

18 partners who assisted me on it and then Zach Adams

19 was the senior associate who did all the useful work.

20 Q. Alright. And you said you moved to Paul

21 Hastings a couple of years ago. Did you bring at

22 least some members of that team with you to Paul

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1 Hastings?

2 A. Jamie Gardner came with me to Paul

3 Hastings.

4 Q. Mr. Adams didn't come with you?

5 A. No.

6 Q. Did Ms. Gardner continue to work on the

7 case at Paul Hastings?

8 A. Yes, she did.

9 Q. Okay. And let me just ask you very

10 generally about Exhibit 117, which is that group of

11 bills that have been put together for both the work

12 at Paul Hastings and the work at Patton Boggs.

13 In your opinion, are the services rendered

14 on behalf of Mr. Bissonnette reasonable and

15 necessary?

16 A. Yes.

17 Q. And was the time spent on the -- each

18 service reasonable and necessary, in your opinion?

19 A. Yes.

20 Q. And are the hourly rates that are charged

21 that are reflected on the bills reasonable and

22 necessary?

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1 A. Yes. I think they were fair.

2 Q. Okay. And let me turn now to -- I'll skip

3 some of this.

4 Right at the end of his examination of you

5 Mr. Furman asked if you had some opinions about

6 whether Mr. Podlaski should have advised Mr.

7 Bissonnette to submit, "No Easy Day" to a

8 prepublication review.

9 Do you recall that question, generally?

10 A. Yes, I do.

11 Q. Let me ask you a follow-up question to

12 that. And that is: Do you believe that that advice,

13 which you said, in your opinion, was negligent was a

14 proximate cause of damage to Mr. Bissonnette?

15 MR. PATRIZIA: Object to the form.

16 I'll permit the witness to answer.

17 A. Well, I think it resulted in the fact that

18 he was required to forfeit a substantial portion of

19 the proceeds of the book to the government.

20 MR. FURMAN: And I'll just note my

21 objection to the question.

22 BY MR. TOBEY:

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1 Q. And that was, obviously, a monetary damage

2 to Mr. Bissonnette?

3 A. That's right.

4 Q. Okay. And are there any other damages

5 that you can think of that Mr. Bissonnette has

6 suffered as a result of that advice?

7 A. Well, I know that Mr. Bissonnette loathed

8 every moment of the process starting on August 31st,

9 2012 until we reached agreement with the government

10 and on at least one occasion told me that he would

11 much rather strap on his gear again and night assault

12 a building full of Taliban than go into a room with

13 another lawyer.

14 Q. That's a pretty strong statement, isn't

15 it?

16 A. Yeah.

17 MR. FURMAN: I wonder if he said that

18 after my deposition of him. I don't think so.

19 MR. TOBEY: Well --

20 THE WITNESS: You're too nice to be a

21 lawyer, Mark.

22 BY MR. TOBEY:

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1 Q. Mr. Furman asked you a number of questions

2 about the settlement that was reached with the

3 government that was confirmed by the consent decree

4 that was entered in August of last year.

5 Do you recall those questions?

6 A. Yes, I do.

7 Q. Is it your opinion that that settlement

8 was reasonable and necessary?

9 A. Yes, it is.

10 Q. Alright. At any point in time starting on

11 August the 30th of 2012 when you started your

12 representation of Mr. Bissonnette all the way and

13 through the final settlement in August of 2016, in

14 your opinion, was there a reasonable opportunity to

15 settle both the civil and criminal claims that the

16 government was asserting?

17 A. Well, let me put it this way: We settled

18 both cases on the best possible terms that we could

19 achieve at the earliest possible date.

20 Q. Okay. And so even though I think Mr.

21 Furman elicited some testimony from you that

22 indicated there were term sheets that may have gone

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1 back and forth as early as, say, 2014, there really  
2 wasn't an opportunity any earlier than August of 2016  
3 to settle everything?

4 A. That's right.

5 Q. Okay. Mr. Furman asked you a series of  
6 questions about the prepublication review process.  
7 And it sounded like from your answers that before you  
8 represented Mr. Bissonnette you had some experience  
9 in that area?

10 A. That's correct.

11 Q. And you actually had direct experience  
12 with Mr. Bissonnette in conjunction with the  
13 PowerPoint slides that you told him to submit to the  
14 government for approval?

15 A. That's right. So that would have been  
16 March and April of 2013.

17 Q. Alright. And I think you indicated in  
18 questions from Mr. Furman that the government at  
19 various times told you that they had issues with --  
20 let me make sure I quote it right -- tactics and  
21 procedures that were in the book.  
22 Did I write that down right?

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1 A. That's right.

2 Q. Okay. And I take it --

3 A. And let me qualify that, which is that in  
4 the context of the two proffers the government shared  
5 a list of things in the book that they thought should  
6 not have been included.

7 And so when I answered that -- your  
8 question, I am not referring to those because I'm not  
9 free to talk about them.

10 Q. I take it that would be classified  
11 information?

12 A. That's exactly right.

13 Q. And if you divulge that, all seven people  
14 in this room would be in trouble?

15 A. Well, I would certainly get hit by a bolt  
16 of lightning. That's for sure.

17 Q. And some of the rest of us might catch  
18 some collateral damage.

19 A. Right.

20 Q. Alright. So when you refer to tactics and  
21 procedures, that's kind of a generic description.  
22 Can you say, without violating that confidentiality,

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1 whether or not Mr. Bissonnette and Mr. Maurer, the  
2 cowriter, could have written around those issues that  
3 were raised by the government?

4 MR. FURMAN: Objection.

5 BY MR. TOBEY:

6 Q. You can answer, if you can.

7 A. I think they could have.

8 Q. Was there anything in your opinion that  
9 would have just made this book unsellable, according  
10 to the issues raised by the government?

11 MR. FURMAN: Objection.

12 A. No. But, you know, with the caveat,  
13 obviously, that I can't discuss the specifics.

14 BY MR. TOBEY:

15 Q. I understand, and don't want you to.  
16 Now, let me ask you kind of a related  
17 question: In any of your discussions with the  
18 government, did they ever say that Mr. Bissonnette  
19 was prohibited generally from talking about either  
20 the Captain Phillips Mission or the Operation Neptune  
21 Spear?  
22 MR. PATRIZIA: Object to the form.

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1 I'll permit the witness to answer.

2 A. Based on the issues that the government  
3 raised in the proffer sessions, it was my  
4 understanding that their concerns had to do with  
5 specific matters rather than generally talking about  
6 missions.

7 BY MR. TOBEY:

8 Q. Okay. Now, let me ask you this: In your  
9 discussions with the government, did you raise the  
10 fact that because Mr. Bissonnette had a fairly long  
11 tenure with the Navy, about 12 years that he would  
12 have a pretty good idea of what would be sensitive or  
13 classified and he was not going to include that in  
14 the book as kind of a good faith argument?

15 MR. PATRIZIA: Object to the form.

16 I'll permit the witness to answer.

17 MR. FURMAN: Objection.

18 A. I certainly argued that he behaved in good  
19 faith. I think fairer to say that the way I  
20 characterized it was that he would never disclose  
21 something that would endanger the people with whom he  
22 served.

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1 So it had less to do with his -- the  
2 length of his tenure in the Navy and more his loyalty  
3 to his friends and colleagues.

4 BY MR. TOBEY:

5 Q. And in connection with your representation  
6 of Mr. Bissonnette, did you have conversations with  
7 Mr. Maurer, the cowriter?

8 A. No.

9 Q. No?

10 A. You know, I see him on some of the email  
11 strings from the first day or two. And so we may  
12 have spoken in that initial period of time, but I  
13 don't think I ever had an extended conversation with  
14 him or a one-on-one.

15 Q. Okay. Let me turn to the issue of whether  
16 Mr. Podlaski was fired at some point in time.

17 Did you ever fire Mr. Podlaski as Mr.  
18 Bissonnette's lawyer?

19 A. No. And I don't think that I would have  
20 been free to do it. He was retained by Mr.  
21 Bissonnette. And we worked together, but I had not  
22 retained him, and so I never would have thought that

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1 I would have had the capacity to fire him.

2 Q. And to your knowledge, did Mr. Bissonnette  
3 ever fire Mr. Podlaski as his lawyer?

4 A. Not to my knowledge.

5 Q. Okay. In this time frame beginning on  
6 August the 30th of 2012 and going through December 31  
7 of 2012, did you ever tell Mr. Bissonnette that he  
8 shouldn't rely on any advice he might receive from  
9 Mr. Podlaski?

10 A. No, I didn't say that.

11 Q. And I think you answered this in  
12 conjunction with some of Mr. Furman's questions, but  
13 I want to make sure it's clear.

14 At the point in time where you decided  
15 that the best defense was going to be Mr.  
16 Bissonnette's reliance on the advice of his counsel,  
17 Mr. Podlaski, was it important to you that you have  
18 Mr. Podlaski's help in regard to that defense?

19 A. Well, yes. I mean, I did expect that it  
20 might be relevant, that he might become a witness.  
21 And I certainly wanted from Mr. Podlaski both an  
22 understanding of what he was asked to do and what

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1 advice he gave and to be able to relay that  
2 accurately to the government as necessary.

3 So sure. I was counting on his  
4 cooperation.

5 Q. And I take it you didn't want to  
6 antagonize him for any reason, if that was avoidable?

7 A. No.

8 Q. Let me ask you about the Freedom of  
9 Information Act request. I think you said that when  
10 Mr. Podlaski suggested it you thought it was a good  
11 idea?

12 A. I did.

13 Q. Alright. And to your knowledge -- and let  
14 me ask you: Did Mr. Podlaski copy you with those  
15 requests to the government?

16 A. You know, I don't recall. I think that I  
17 saw them, but I don't -- I don't remember.

18 I mean, I think that I was aware that he  
19 had filed them. But whether I received copies of the  
20 requests themselves, I don't recall.

21 Q. Alright. And do you recall generally what  
22 the timeline was in terms of when those requests were

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1 made and when responses were received?

2 A. I don't.

3 Q. Okay. And is it fair to say that the  
4 information that he might receive from that freedom  
5 of information request could have been helpful to you  
6 in your defense of Mr. Bissonnette?

7 A. It's certainly possible. I mean, we were  
8 making a -- you know, through the spring of 2014 when  
9 we agreed on a term sheet, we were making a variety  
10 of legal, quasi legal, equitable arguments.

11 And certainly how the government had dealt  
12 with other similar matters, which was the point of  
13 this FOIA request, was something that was potentially  
14 relevant to the kinds of things that we were saying  
15 to the government.

16 Q. Let me ask you: From August 30, 2012  
17 through December 31, 2012, did you ever tell Mr.  
18 Bissonnette that Mr. Podlaski had committed  
19 malpractice?

20 A. No, I did not.

21 Q. Okay. Do you know -- in that same time  
22 frame, August 30, 2012 through December 31, 2012, do

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1 you know if anyone else told him that Mr. Podlaski  
2 had committed legal malpractice?

3 A. I'm not aware of anyone who shared that  
4 view with him.

5 Q. Do you know of any way, other than perhaps  
6 you or someone else telling him that Mr. Podlaski had  
7 committed legal malpractice in that time frame, that  
8 Mr. Bissonnette could have discovered that fact?

9 MR. FURMAN: Objection.

10 MR. PATRIZIA: Object to the form.  
11 I'll permit the witness to answer.

12 BY MR. TOBEY:

13 Q. Do you want me to rephrase it?

14 A. No. I mean, I think I know what you're  
15 getting at. I guess the short answer is that my  
16 understanding at the time was that Matt was looking  
17 to me and also to Kevin for advice on this issue.

18 And I don't know of anyone else who was  
19 providing him with legal advice during that period of  
20 time.

21 Q. Okay. Mr. Furman asked you a lot of  
22 questions at the beginning of the deposition about

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1 potentially stopping distribution of the book when  
2 you were hired on August the 30th.

3 Is there any way you could have done that  
4 if you thought that was the right thing to do?

5 A. I certainly didn't understand that I had  
6 authority to do so. If I thought that that was the  
7 right course of action, I certainly could have asked  
8 the publishers to withdraw the book.

9 But I didn't have -- Mr. Bissonnette  
10 didn't have the authority to stop the publication.

11 Q. Do you know mechanically if that even  
12 could have been done at that late date?

13 A. I don't know, and I don't know enough  
14 about the publishing industry to know whether or not  
15 that was possible. I didn't think that it was in Mr.  
16 Bissonnette's interest to do so and so never further  
17 explored that possibility.

18 Q. Would it be fair to say that if Mr.  
19 Bissonnette tried to stop publication at that time he  
20 would have been exposed to a claim by the publisher?

21 MR. FURMAN: Objection.

22 A. I did review Mr. Bissonnette's contract

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1 with the publisher. And the contract called for him  
2 to submit a publishable manuscript that met all legal  
3 and regulatory requirements.

4 And so my concern was, frankly, in  
5 balancing the risks to Mr. Bissonnette that if we  
6 proceeded with the publication and the government was  
7 able successfully to bring a forfeiture action that  
8 his liability would be limited to his share of the  
9 proceeds.

10 Whereas, if the book were withdrawn, the  
11 government -- the publisher would have had a very  
12 strong case for breach of contract against Mr.  
13 Bissonnette and might have proceeded against him with  
14 a claim for 100 percent of the book's proceeds as  
15 opposed to his royalty share of the proceeds.

16 So even leaving aside the risks of  
17 forfeiture, in my view, the risks of trying to get  
18 the book stopped was, in financial terms,  
19 significantly greater to Mr. Bissonnette than the  
20 risk of proceeding.

21 BY MR. TOBEY:

22 Q. Along those lines of your answer, let me

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1 ask you something about the settlement.

2 You talked about the reasonableness from a  
3 monetary standpoint. Did the settlement also help  
4 Mr. Bissonnette with his reputation, I mean, versus  
5 what might have happened if you had tried that case  
6 against the government?

7 MR. PATRIZIA: Object to the form.  
8 I'll permit the witness to answer.

9 A. Well, in the resolution, both the  
10 complaint and the consent decree, the government  
11 essentially receded from any allegations that he had  
12 improperly disclosed classified information or that  
13 he had endangered his colleagues and based the legal  
14 claim and settlement solely on the failure to seek  
15 prepublication review.

16 And obviously from a reputational  
17 perspective, that was significantly preferable for  
18 Mr. Bissonnette.

19 MR. FURMAN: Object to the -- it's late in  
20 the day. I'm going to object to the question and  
21 also the answer. There's no foundation to give an  
22 opinion, one way or the other, on reputation.

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1 I don't normally state my basis for  
2 objections. So the fact I didn't do so on other  
3 occasions I've objected doesn't mean I've waived any  
4 basis. I just impulsively felt the need to say that.  
5 MR. TOBEY: Duly noted.  
6 BY MR. TOBEY:  
7 Q. In your opinion, did Mr. Bissonnette  
8 violate the law by sending the manuscript of, "No  
9 Easy Day" to Mr. Podlaski for review?  
10 MR. PATRIZIA: Object to form.  
11 I'll permit the witness to answer.  
12 A. I think that in theory, one could make the  
13 argument that sharing the manuscript could be deemed  
14 to be a publication because he shared it with another  
15 person.  
16 But I -- at some point it starts to look  
17 like a hall of mirrors. And I would be shocked if  
18 the government were to take that position.  
19 In other words, if someone shared a  
20 manuscript with his counsel for the purpose of  
21 getting legal advice, I can't imagine that the  
22 government, under those circumstances, would take the

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1 view that that itself was an act of publication that  
2 breached an underlying agreement.  
3 But, you know, in a law school exam, I  
4 would expect someone to at least flag that as an  
5 issue.  
6 BY MR. TOBEY:  
7 Q. Let me switch gears on you and talk about  
8 the issue about the files -- the production of the  
9 files from the Carson Boxberger firm to the  
10 government versus what my law firm produced to you,  
11 which you then produced to the government.  
12 Did this issue increase your legal costs  
13 for Mr. Bissonnette?  
14 A. You know, it -- there were certainly email  
15 traffic back and forth about this issue and that time  
16 was billed, but it would be difficult for me to  
17 quantify how much time was spent pursuing that issue.  
18 The underlying issue of candor was really  
19 what made that issue significant.  
20 MR. TOBEY: I want to mark these few  
21 exhibits and I think I may be done. Let's take just  
22 a minute to do that.

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1 (Exhibit Numbers 123 through 127 were  
2 marked for identification and were attached to the  
3 deposition.)  
4 BY MR. TOBEY:  
5 Q. Mr. Luskin, let's talk about these for  
6 just a minute.  
7 Exhibit 123 looks like an email that you  
8 sent to Mr. Peak on September 25, 2014?  
9 A. That's right.  
10 Q. Alright. And in that email, you're  
11 conveying the contents of the file as you understood  
12 it from Mr. Podlaski?  
13 A. That's right.  
14 Q. Alright. Exhibit 124 is an email chain.  
15 And if I can call your attention, first, to the  
16 fourth page of the exhibit, which appears to be an  
17 email from Mr. Peak to you dated October 24, 2014.  
18 Do you see that?  
19 A. Yes, I do.  
20 Q. And it says: "Bob, thanks for sending the  
21 second CD. I have reviewed it and I am wondering  
22 whether this is a situation in which Mr. Podlaski is

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1 performing a, quote, rolling production, end quote.  
2 "I say that because it still appears to me  
3 that many kinds of documents one would reasonably  
4 expect to find in an attorney's file are missing."  
5 He goes on to say: "The invoices included  
6 therein recite billings for the preparation of  
7 letters and emails to Mr. Bissonnette and others  
8 regarding a myriad of issues relevant to Mr.  
9 Podlaski's representation and our investigation, but  
10 I do not see those letters or emails in the  
11 production."  
12 Is this kind of when problems started with  
13 Mr. Peak on this issue?  
14 A. That is probably correct.  
15 Q. Okay. And when did you find out that he  
16 had separately gone to the Carson Boxberger firm and  
17 gotten production of the file from that source?  
18 A. Well, I mean as you can see from this  
19 email string, we had initially prepared a waiver  
20 letter so that they could interview and obtain  
21 documents from Mr. Podlaski.  
22 He asked for revisions of those. I

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1 assumed that the government then shared that letter  
2 with Mr. Podlaski.

3 But when we then returned for a further  
4 proffer, this issue surfaced in the form of Mr. Peak  
5 indicating that they had a number of documents that  
6 they had reviewed that we had not produced. And  
7 that's when he suggested that I had cleaned up the  
8 file.

9 Q. Okay. Looking at Exhibit 125, is that the  
10 revised waiver letter, specifically looking at the  
11 second page?

12 A. Well, he asked for a revision. So let me  
13 look at that. This looks like it incorporates the  
14 change that Mr. Peak had requested. And given that  
15 and the fact that it's signed on or about that date,  
16 it seems to me a fair assumption that this is, in  
17 fact, the final waiver letter.

18 Q. Okay. So would it be your understanding  
19 that the government went to the Carson Boxberger firm  
20 after October 28th to get production of its file?

21 MR. PATRIZIA: Object to form.

22 I'll permit the witness to answer.

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1 A. I would assume so.

2 BY MR. TOBEY:

3 Q. Okay. Looking at Exhibit 126, which  
4 appears to be another email chain, on the third page,  
5 which is the first email in the chain, it's dated  
6 September 23. So this chain actually goes over a  
7 couple of months, it looks like.

8 You say in the second paragraph of your  
9 email to Mr. Peak and to Brian Fleming: "As I  
10 mentioned, we will separately send the electronic  
11 copy of the Podlaski file that Matt's malpractice  
12 lawyer received from Podlaski and his firm."

13 "We have incorporated information from  
14 that file into the chron, but also wanted you to have  
15 access to the file in the form that it has been  
16 shared with us."

17 So that's when you made the first  
18 production?

19 A. That's correct.

20 Q. And then on the second page, Mr. Peak  
21 writes you back significantly later on November 5th.  
22 And he says in the second paragraph: "As we

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1 discussed a few weeks ago, we have not found much in  
2 the Podlaski file that one would expect to find and  
3 we have not found other information/documents that  
4 would support your timeline."

5 So were you having problems with Mr. Peak  
6 at that time about his concern that you weren't being  
7 forthcoming?

8 A. Yes.

9 Q. And then in the very first email in the  
10 exhibit, which is from you to him and Mr. Fleming and  
11 Solomon Hagedon -- who is Mr. Hagedon, by the way?

12 A. Mr. Hagedon was an investigator for NCIS  
13 who was principally assigned to this -- to the  
14 criminal case.

15 Q. And in that first email, are you  
16 expressing, I guess, the frustration at what you had  
17 received that was from Mr. Podlaski's file?

18 A. Let me take a look at it, please. That's  
19 right.

20 Q. And lastly on this subject, I think you  
21 talked in Exhibit 126 about sending a chronology that  
22 was annotated with documents?

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1 A. That's correct. We offered to do that.

2 Q. Right. And is 127 that document?

3 A. This does appear to be the annotated  
4 chron. That's right.

5 Q. Alright. And was the annotated chron  
6 prepared by your office?

7 A. It was.

8 Q. And was the annotated chronology helpful  
9 with you for you with -- let me strike that.

10 Was the annotated chronology helpful to  
11 you in your discussions with the government?

12 A. Yes, it was. I mean, it was helpful to us  
13 in preparing for discussions with the government and  
14 it was helpful in our relationships with the  
15 government because I think it facilitated digesting  
16 of a very substantial volume of material and then  
17 putting it in some coherent chronologically correct  
18 form.

19 MR. TOBEY: If we can take about a  
20 five-minute break, I think I'm about to wrap up.  
21 I'll go through my notes one more time.

22 MR. PATRIZIA: Off the record.

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1 (A break was taken.)  
2 BY MR. TOBEY:  
3 Q. Let me ask you this: In regard to the  
4 file production issue, in your opinion, what should a  
5 lawyer do when a client demands a file from the  
6 lawyer?  
7 MR. FURMAN: Objection.  
8 A. You know, I think you turn the file over.  
9 And I know in DC, DC is a full file state  
10 jurisdiction so that if a client asks for a file,  
11 even if the client is grotesquely in arrears of his  
12 fees, you turn over the file.  
13 BY MR. TOBEY:  
14 Q. And you say, "a full file." Does that  
15 mean everything in the file?  
16 A. That's correct.  
17 Q. And are you aware of any basis for a  
18 lawyer to withhold portions of the file such as  
19 emails, letters, research when a client makes a  
20 demand?  
21 A. I am not.  
22 Q. Okay. Let me ask you this question:

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1 After your meetings with the government, do you  
2 believe there was anything that's either classified,  
3 confidential, or sensitive in, "No Easy Day" that  
4 would have jeopardized the safety of the United  
5 States?  
6 MR. FURMAN: Objection.  
7 A. I can't answer that question because I  
8 can't disclose what the subject matter -- the  
9 specific subjects that were raised by the government.  
10 And I'm not in a position to make a judgment about  
11 what would be potentially harmful.  
12 BY MR. TOBEY:  
13 Q. Okay. Last topic for you, there was a  
14 second 60 Minutes story in November of 2014 involving  
15 Mr. Bissonnette.  
16 Do you recall that?  
17 A. Yes, I do.  
18 Q. And did you appear on the story as well?  
19 A. I did.  
20 Q. In connection with that story, did you  
21 ever identify Mr. Podlaski as the -- being the lawyer  
22 who gave the advice not to go to a prepublication

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1 review?  
2 A. No, I did not.  
3 Q. Do you know of anybody else who may have  
4 told 60 Minutes that Mr. Podlaski was the lawyer who  
5 gave Mr. Bissonnette the advice not to submit to a  
6 prepublication review?  
7 A. I know that 60 Minutes was aware of that  
8 fact because one of the producers said to me that  
9 they were aware that Mr. Podlaski was the attorney.  
10 And my response was that I was not going to confirm  
11 or deny that.  
12 Q. Do you know from what source 60 Minutes  
13 may have obtained that information?  
14 A. I don't and they didn't share it with me.  
15 MR. TOBEY: Pass the witness.  
16 EXAMINATION BY COUNSEL FOR DEFENDANTS  
17 BY MR. FURMAN:  
18 Q. I just have very limited follow-up to Mr.  
19 Tobey's questions.  
20 Mr. Tobey asked you about whether it was  
21 appropriate for Mr. Bissonnette to provide the  
22 manuscript to Kevin Podlaski.

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1 My question to you is: Was it appropriate  
2 for Mr. Bissonnette to provide the details of  
3 Operation Neptune Spear to Kevin Maurer, the  
4 cowriter?  
5 A. Well, again, I think using this same  
6 analysis an argument can be made that any disclosure  
7 is a disclosure.  
8 But I think as a practical matter, the  
9 government views the prepublication review process as  
10 the firewall, recognizing that in real life if an  
11 author writes a manuscript there may be a typist or  
12 an editor or other individuals who stand between the  
13 author in the moment when you -- and a lawyer, after  
14 all, who stand in between the author's creative act  
15 and physically being able to hand a manuscript to the  
16 office of prepublication security review.  
17 So I guess what I'm saying is, there's a  
18 theoretical argument to be made that any disclosure  
19 violates the SCI agreement,  
20 I think in real life the government  
21 interprets that to mean any broad disclosure,  
22 recognizing that the steps of creating a manuscript

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1 that you are then able to submit may entail  
2 assistance from other individuals.

3 Q. Would you apply that same analysis to Mr.  
4 Bissonnette's providing details of Operation Neptune  
5 Spear to Elyse Cheney, his literary agent? Would  
6 that also apply?

7 In other words, I'll ask you the same  
8 question I asked you about Kevin Maurer. Was it  
9 appropriate, in your view, for Mr. Bissonnette to  
10 provide the details of operation Neptune Spear to his  
11 literary agent at some point in December 2011?

12 A. I think the same analysis applies.

13 Q. And just lastly, would that same analysis  
14 apply to Mr. Bissonnette's revealing of details of  
15 Operation Neptune Spear to the publisher, Mr. Sevier,  
16 at Penguin?

17 A. Again, I think the same analysis. And I  
18 think where the government would draw the line would  
19 be any sort of broad dissemination.

20 Q. Along these lines -- if you can just turn  
21 to document number 127 and specifically to documents  
22 ending 2892, which is a letter from Mr. Sevier dated

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1 December 23rd of 2011 to Mr. Bissonnette, which  
2 includes an outline. And it ends in document ending  
3 2897 -- 2898.

4 A. I see the entry on December the 23rd.

5 Q. And I'm referring to the actual letter  
6 itself.

7 MR. PATRIZIA: He's looking to the Bates  
8 numbers. So it was 2892 --

9 MR. FURMAN: 2892 -- thank you, Mr.  
10 Patrizia -- and it ends in 2898.

11 A. So you want me to look at the chapter  
12 outline?

13 BY MR. FURMAN:

14 Q. First of all, are you familiar with this  
15 letter and the chapter outline?

16 A. I'm sure I saw it at some point.

17 Q. Now, if -- I will ask you to turn your  
18 attention to the chapter outline itself.

19 And specifically as an example on page  
20 ending 896, there was a question about being briefed  
21 by the agency chick, as the word appears in the  
22 outline by Mr. Sevier.

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1 I'm assuming that's a reference to the CIA  
2 operative who --

3 A. Played by Jessica Chastian in the movie.

4 Q. -- was played by an actress in "Zero Dark  
5 Thirty"?

6 A. Right.

7 Q. Otherwise known to Mr. Sevier as, "the  
8 agency chick."

9 Do you see anything inappropriate about  
10 the question being posed to Mr. Bissonnette and Mr.  
11 Bissonnette then starting to write a manuscript that  
12 responds to questions like the briefing from the CIA  
13 before obtaining prepublication approval?

14 A. There's certainly nothing inappropriate  
15 about asking the question, saying essentially, can  
16 you write a book about X.

17 And there would be nothing inappropriate  
18 about writing a manuscript that responded to that  
19 question provided that you didn't publish it without  
20 first submitting it for review.

21 So I don't think the government construes  
22 the requirements to intrude into the creative

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1 process. But as I said, the firewall was  
2 publication.

3 Q. And I'm just pointing this out as an  
4 example and certainly not exhaustive of all of the  
5 issues that are addressed in Mr. Sevier's December  
6 23rd, 2011 letter and also his outline.

7 But as an example under Section 8 on that  
8 very same page, the third question then states: "Who  
9 planned the mission?" And that is referring to  
10 Operation Neptune Spear,

11 Again, same question: Do you believe that  
12 it would -- it was appropriate for that question and  
13 that process of preparing information in response to  
14 that question -- appropriate without seeking  
15 prepublication approval?

16 A. Again, I see absolutely nothing wrong in  
17 asking the question. I don't see anything wrong in  
18 writing the answer provided that you submit it for  
19 prepublication review before it's published.

20 And I think you make the fair point, and I  
21 said it before, that I think in a completely  
22 theoretical sense any act of disclosure theoretically

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1 falls within the four corners of the agreement  
2 because it is a disclosure.  
3 But I think a fair and reasonable reading  
4 of the agreement is that it's intended -- it's not  
5 intended to interfere with the creative process, but  
6 it is intended to stop publication without review.  
7 So editors can ask. Coauthors can  
8 contribute. Writers can write. People can record  
9 their recollections. And you can build out of that a  
10 manuscript, but you don't widely circulate it until  
11 you've submitted it.  
12 Q. The follow-up question I have to that is  
13 just -- because I want -- and I appreciate your  
14 answer. And I want to understand if there's  
15 parameters around what you believe to be the  
16 reasonableness of the interpretation of publication.  
17 Because here just based on what we know on  
18 Exhibit Number 127 and based on your knowledge so far  
19 developed in this testimony today, certainly Mr.  
20 Podlaski was aware of the manuscript before the  
21 government was aware or this book was ever submitted  
22 for any kind of review by the Department of Defense.

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1 And a publisher, at least one person, Ben  
2 Sevier; a literary agent, at least one person that we  
3 know of, Elyse Cheney; and a co-author, Kevin Maurer  
4 -- at what point -- that's four people.  
5 At what point does publication become  
6 publication in the sense of violating the agreement  
7 that Mr. Bissonnette signed?  
8 A. You know, it's sort of like asking the  
9 question, you know, when is sunset. Do you know what  
10 I mean? First it's light. Then it's dark. At some  
11 point in between, we cross that line. But when is  
12 the exact moment?  
13 The only way I think I can answer it is  
14 that, to my knowledge, the government has never taken  
15 the position that the sort of routine things that go  
16 on in the creative process prior to the point where a  
17 publishing company like Penguin actually sends -- you  
18 know, creates a book and sends it out for review and  
19 sends it out to people who are not in any way  
20 involved in the creative process.  
21 I'm not aware of their ever taking the  
22 position that the disclosure among that core group of

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1 folks constitutes an improper disclosure for purposes  
2 of the prepublication review requirement.  
3 Q. Alright. Thank you.  
4 And one last question: Are you aware of  
5 any governmental agency confirming, one way or the  
6 other, as to whether, "No Easy Day" contains  
7 classified information?  
8 A. I am not aware of any such confirmation.  
9 As I said, the only -- what I am aware of is the list  
10 that the government prepared in connection with the  
11 proffer that Mr. Bissonnette went through.  
12 And how exactly that list was prepared and  
13 who was consulted, that information was not shared  
14 with me.  
15 Q. I understand that about the proffer. What  
16 I'm asking is whether you're aware of whether the  
17 government has made any public announcement, one way  
18 or the other, as to whether, "No Easy Day" contains  
19 classified information?  
20 A. No, except in the negative inferences that  
21 can be drawn from the complaint and consent decree  
22 that resolved this matter that made no reference to

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1 the improper disclosure of classified information.  
2 Q. And those are negative inferences that you  
3 make?  
4 A. I certainly do.  
5 MR. FURMAN: Okay. I have no further  
6 questions.  
7 EXAMINATION BY COUNSEL FOR PLAINTIFF  
8 BY MR. TOBEY:  
9 Q. I just have a couple. I forgot to mark a  
10 couple of documents. It will take about five minutes  
11 and we'll be done. 131.  
12 (Exhibit Numbers 128 through 131 were  
13 marked for identification and were attached to the  
14 deposition.)  
15 BY MR. TOBEY:  
16 Q. Mr. Lusk, I've just handed you Exhibit  
17 128. Is this an email exchange that you had with Mr.  
18 Parker and Mr. Easton?  
19 A. That's right.  
20 Q. I gave this to you really for one purpose,  
21 which was on page number 8 of the email chain -- it  
22 actually starts on the bottom of page 7.

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1 It's an email from you to Mr. Parker dated  
2 August 11, 2015.

3 Do you see that?

4 A. Um-hum.

5 Q. And you say: "Brian Fleming shared your  
6 contact information with me so that we might begin a  
7 discussion about resolving the civil side of Matt's  
8 case now that, as Brian relates, DOJ has closed the  
9 criminal investigation."

10 So does that kind of put a box in terms of  
11 when the criminal investigation was resolved?

12 A. That's right. And that's consistent with  
13 my recollection that it was August of 2015.

14 Q. Alright. And I note attached to this  
15 there's -- it looks like a schedule of royalties and  
16 also a speaking engagement list?

17 A. That's right.

18 Q. And this was information that you provided  
19 to the government on behalf of Mr. Bissonnette?

20 A. That's right, in connection with the  
21 proposed settlement.

22 Q. Alright. The next exhibit, 129, is that a

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1 blank form of the sensitive compartmented information  
2 nondisclosure agreement or does it appear to be?

3 A. It certainly appears to be.

4 Q. Alright. And does Exhibit 130 appear to  
5 be a blank form of a classified information  
6 nondisclosure agreement?

7 A. It does.

8 Q. And I take it Exhibits 129 and 130 would  
9 be identical to what Mr. Bissonnette signed?

10 A. That's correct, I mean, assuming that  
11 they're the versions that were applicable in 2007.

12 Q. Okay. And then lastly, Exhibit 131, is  
13 that a form of sensitive compartmented information  
14 debriefing memorandum?

15 A. It is.

16 MR. TOBEY: Alright. Pass the witness.

17 MR. FURMAN: I'll just note for the record  
18 that Exhibit 130 and Exhibit 129 both have at the  
19 very bottom -- on the bottom an indication that these  
20 forms were revised at some point in 2013.

21 For example, document number 129 indicates  
22 on the bottom left-hand side that it was revised as

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1 of December 2013. I don't know, one way or the  
2 other, what that revisions was, obviously.

3 And document 130 was revised, the standard  
4 Form 312, otherwise known as CINA, C-I-N-A, was  
5 revised July of 2013.

6 I just had one question -- just give me a  
7 moment.

8 (A break was taken.)

9 EXAMINATION BY COUNSEL FOR DEFENDANTS

10 BY MR. FURMAN:

11 Q. The question I have was triggered by the  
12 introduction of the various agreements.

13 The -- in order to connect the acronyms  
14 that were contained in the 2007 SCI nondisclosure  
15 agreement that Mr. Bissonnette signed and to connect  
16 those acronyms to Operation Neptune Spear, would you  
17 have to have access to classified information in  
18 order to make that connection?

19 A. I expect that you would.

20 Q. And when you were briefed on that and  
21 shown additional documents on September 20th of 2012  
22 by Jeh Johnson that connected the acronyms to

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1 Operation Neptune Spear, were you read into any kind  
2 of special access program or provided with clearance?

3 A. I was asked to sign a nondisclosure  
4 agreement --

5 Q. Okay. And --

6 A. -- and then subsequently in connection  
7 with the criminal investigation formally had my  
8 clearance reactivated for the purpose of the  
9 investigation and then signed another nondisclosure  
10 agreement in connection with that.

11 Q. If I were to ask you in the context of  
12 this civil lawsuit to please explain to me how it is  
13 that the 2007 SCI nondisclosure agreement that Mr.  
14 Bissonnette signed related to Operation Neptune  
15 Spear, would you have to reveal classified  
16 information to tell me the answer to that?

17 MR. PATRIZIA: Object to form.

18 A. I think to give you a detailed answer to  
19 that I think that I would.

20 MR. FURMAN: I don't think I have any  
21 other questions. Thank you.

22 MR. TOBEY: Nothing further.

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1 THE REPORTER: Reading and signing?

2 MR. PATRIZIA: Read and sign, yes.

3 THE REPORTER: Copy, Mr. Patrizia?

4 MR. PATRIZIA: Yes, please. Rough also,

5 please.

6 MR. TOBEY: Please, and a condensed. Can

7 you send, like, an email version, too, and a rough?

8 THE REPORTER: Yes.

9 MR. FURMAN: Could we have a rough draft

10 by email?

11 THE REPORTER: Yes.

12 (Signature having not been waived, the

13 deposition of Robert D. Luskis was concluded at 4:12

14 p.m.)

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, SHERRY L. BROOKS, a Notary Public in

3 and for the DISTRICT OF COLUMBIA before whom the

4 foregoing deposition was taken, do hereby certify

5 that the witness whose testimony appears in the

6 foregoing deposition was duly sworn by me; that the

7 testimony of said witness was taken by me in

8 Shorthand at the time and place mentioned in the

9 caption hereof and thereafter transcribed by me; that

10 said deposition is a true record of the testimony

11 given by said witness; that I am neither counsel for,

12 related to, nor employed by any of the parties to the

13 action in which this deposition was taken; and

14 further, that I am not a relative or employee of any

15 counsel or attorney employed by the parties hereto,

16 nor financially or otherwise interested in the

17 outcome of this action.

18 *Sherry L. Brooks*

19 SHERRY L. BROOKS  
Notary Public in and for  
DISTRICT OF COLUMBIA

20 My commission expires: November 14, 2020

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1 ACKNOWLEDGMENT OF DEPONENT

2

3 ASSIGNMENT NO.: J0504403

4 CASE CAPTION: MATTHEW BISSENNETTE -V- KEVIN PODLASKI  
AND CARSON BOXBERGER, LLC

5 DEPONENT: ROBERT D. LUSKIN

6

7 DECLARATION UNDER PENALTY OF PERJURY

8 I declare under penalty of perjury that I

9 have read the entire transcript of my Deposition

10 taken in the captioned matter or the same has been

11 read to me, and the same is true and accurate, save

12 and except for changes and/or corrections, if any, as

13 indicated by me on the DEPOSITION ERRATA SHEET

14 hereof, with the understanding that I offer these

15 changes as if still under oath.

16

17 Signed on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Witness Name

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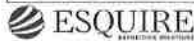
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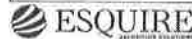
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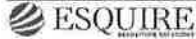
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01-25-2017

Attn: Charles A. Patrizia  
Re: MATTHEW BISSENNETTE V. KEVIN PODLASKI  
Deposition of Robert D. Lusk, taken on 01/18/2017  
Your Case Number 1:15-CV-00334  
Our Reference Number 504403

Dear Sir or Madam:

Please be advised that the transcript in the above-referenced matter is available for reading and signature. Enclosed you will find a condensed copy of the transcript, a Declaration under Penalty of Perjury Certificate and Errata pages to note any necessary changes or corrections to the transcript. The Original transcript has already been released to the custodial party.

The witness should complete the following steps within 30 days of the date of this memorandum:

- Read the enclosed copy of the transcript of your deposition
- Make any corrections necessary on the Errata page only. If you do not wish to make changes, write "No Changes" on the top of the Errata page.
- If you require additional space to list changes, you may use your own paper. Remember to include witness name, deposition date, our reference number, and the page/line location of each change.
- If there are multiple transcript volumes, complete Errata pages separately for each volume.
- Sign the bottom of the Errata page(s)
- Sign and date the Declaration under Penalty of Perjury.
- Return only the Declaration under Penalty of Perjury and signed Errata pages. The condensed transcript is yours to keep.
- Return completed forms to:

Errata Processing Division  
Esquire Corporate Production Department  
Suite 2700, 101 Marietta Street  
Atlanta, GA 30303

If electronic documents are permissible in the applicable venue for this matter, you may instead submit a scanned copy of the Declaration under Penalty of Perjury and signed Errata pages via E-mail to [errata@esquiresolutions.com](mailto:errata@esquiresolutions.com).

Upon our receipt of completed Errata pages, we will archive and make the changes available in electronic form to all counsel. After archiving we will forward the original Errata pages on to the custodial party, to be reunited with the original transcript.

In the event any of the above instructions differ from a stipulation or contradict a previous agreement between counsel regarding witness signature, please disregard this letter's details and follow the protocol as agreed upon by and between counsel.

If you have any other questions regarding this process, please contact Esquire Client Support at 800.211.DEPO (800.211.3376), or [ClientCare@esquiresolutions.com](mailto:ClientCare@esquiresolutions.com).

Thank you,

Corporate Production Department  
Esquire Deposition Solutions

Enclosures

Cc: All Counsel present

Ref: 504403





ROBERT D. LUSKIN  
MATTHEW BISSONNETTE V. KEVIN PODLASKI

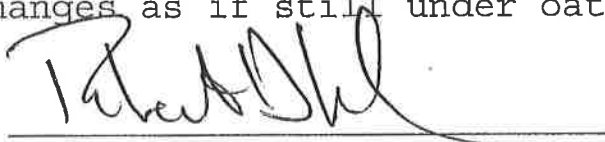
January 18, 2017  
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Reference No.: 504403

Case: MATTHEW BISSONNETTE V. KEVIN PODLASKI

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.



Robert D. Luskin

NOTARIZATION OF CHANGES

(If Required)

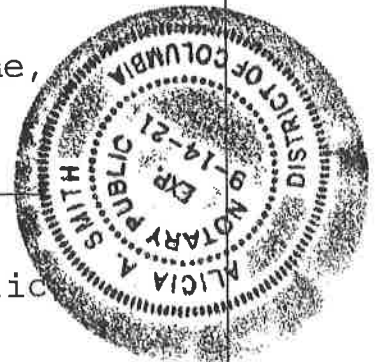
Subscribed and sworn to on the 10<sup>th</sup> day of  
February, 2017 before me,

(Notary Sign) Alicia A. Smith

(Print Name) **ALICIA A. SMITH**  
**NOTARY PUBLIC DISTRICT OF COLUMBIA**  
**My Commission Expires September 14, 2021**

Notary Public

in and for the State of District of Columbia





Robert D. Luskin, ESQUIRE  
January 18, 2017  
Esquire Deposition Solutions

ERRATA SHEET

Case Name: Matthew Bissonnette v. Kevin Podlaski  
Date: January 18, 2017  
Witness Name: Robert D. Luskin, Esquire

Page	Line	Correction	Reason for change
09	7	[inconsistent]	Missing word
09	7	Comma after the word "made,"	Missing punctuation
09	12	Change the word through to the word to	Incorrect word
10	10	Comma after the word "training"	Missing punctuation
10	11	Comma after the word "procedures"	Missing punctuation
10	21	Comma after the word "training"	Missing punctuation
11	2	Delete the word for	Extra word
11	6	Add "ed" to redact	Correct tense
12	7	Delete the word and	Extra word
13	12	Add "is" to process	Correct plural
13	12	Add comma after the word "objective"	Missing punctuation
17	16	Capitalize "O" in the word operation	Need capitalization
17	22	Capitalize "D" in the word Defense	Need capitalization
17	22	Capitalize "D: in the word Department	Need capitalization
20	21	Change word clarified to classified	Incorrect word
28	3	Comma after the word "review"	Missing punctuation
32	9	Delete comma after the word "of"	Incorrect punctuation
33	3	Add ; after the word "about"	Incorrect punctuation
33	5	Add ; after the word "information"	Incorrect punctuation

33	5	Capitalize the letter S in the word second	Missing capitalization
33	12	Capitalize the letter A in the word Administration	Missing capitalization
39	2	Replace the word "set" with the words "be said"	Incorrect word
45	12	Capitalize the letter O in the word One	Missing capitalization
46	18	Comma after the word "were"	Missing punctuation
47	1	Comma after the word "done"	Missing punctuation
49	2	Comma after the word "the"	Missing punctuation
49	3	Comma after the word "back"	Missing punctuation
50	16	Period after the word "personally"	Missing punctuation
50	16	Capitalize the letter A in and	Missing capitalization
54	10	Comma after the word "training"	Missing punctuation
54	11	Put the word "that" after the word procedures	Missing word
58	13	Delete comma and quotation marks before the word "You"	Extra punctuation
58	14-15	Add quotation marks before the word "are" and after the comma after the word "page"	Missing punctuation
58	15	Delete quotation mark after the word "quote"	Extra punctuation
81	12	Change SNEPP to Snepp	Correct capitalization
81	22	Change SNEPP to Snepp	Correct Capitalization
86	3	Change SNEPP to Snepp	Correct Capitalization
106	4	Change SNEPP to Snepp	Correct Capitalization
106	18	Change SNEPP to Snepp	Correct Capitalization
106	22	Change SNEPP to Snepp	Correct Capitalization
107	3	Change SNEPP to Snepp	Correct Capitalization
107	17	Change SNEPP to Snepp	Correct Capitalization
107	22	Change SNEPP to Snepp	Correct Capitalization

111	1	Add the letter P to the word "republishation"	Correct spelling of word
111	4	Change SNEPP to Snepp	Correct Capitalization
112	10	Change SNEPP to Snepp	Correct Capitalization
127	2	Change SNEPP to Snepp	Correct Capitalization
129	11	Change the word "discreet" to discrete	Correct spelling of word
130	7	Change the word "discreet" to discrete	Correct spelling of word
140	11	Change the word "related" to the word relayed	Correct word
143	7	Delete apostrophe in the word Appropriations	Correct punctuation
151	20	Change SNEPP to Snepp	Correct Capitalization
152	13	Change SNEPP to Snepp	Correct Capitalization
153	11	Change SNEPP to Snepp	Correct Capitalization
154	7	Change SNEPP to Snepp	Correct Capitalization
155	19	Replace the word "road" with the word row	Incorrect word
161	20	Change the word "their" to there	Correct spelling
166	9	Change the word "call" to cull	Correct word
181	3	Correct spelling of the name Johnson to Johnston	Correct name spelling
182	16	Correct spelling of the name Johnson to Johnston	Correct name spelling
188	2	Change SNEPP to Snepp	Correct Capitalization

*Robert D. Luskin*  
Robert D. Luskin

District of Columbia: ss  
Subscribed and sworn to before me this  
10<sup>th</sup> day of February, 2017.

*Alicia A. Smith*  
Notary Public

**ALICIA A. SMITH**  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires September 14, 2021

